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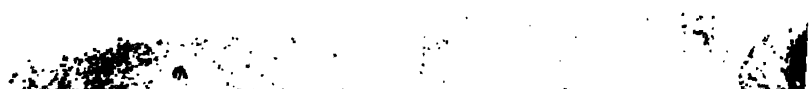
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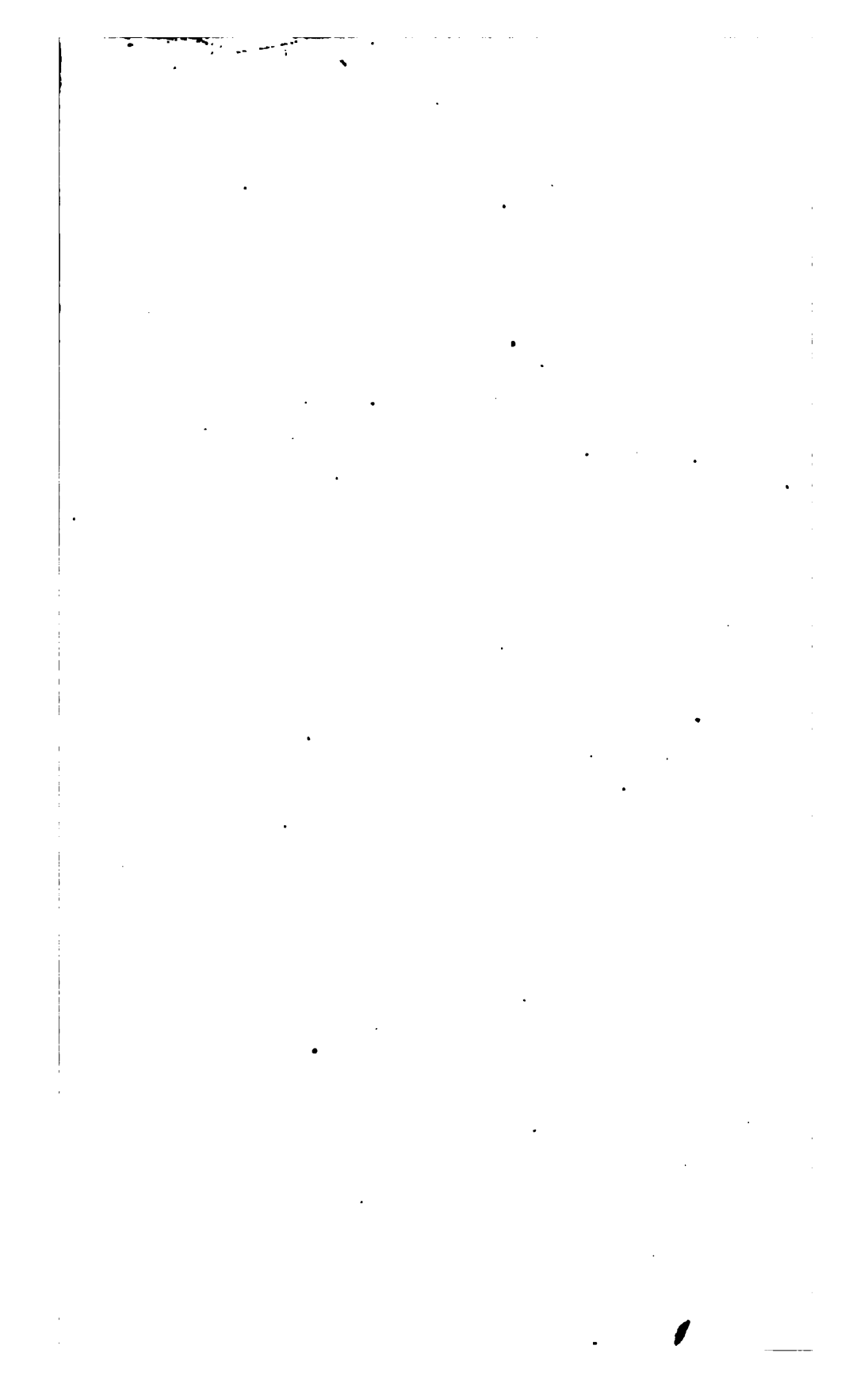
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REPORTS  
OF  
DECISIONS RENDERED  
IN THE  
CIRCUIT AND DISTRICT COURTS  
OF THE  
UNITED STATES.

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BY  
BENJAMIN VAUGHAN ABBOTT.

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VOL. II.

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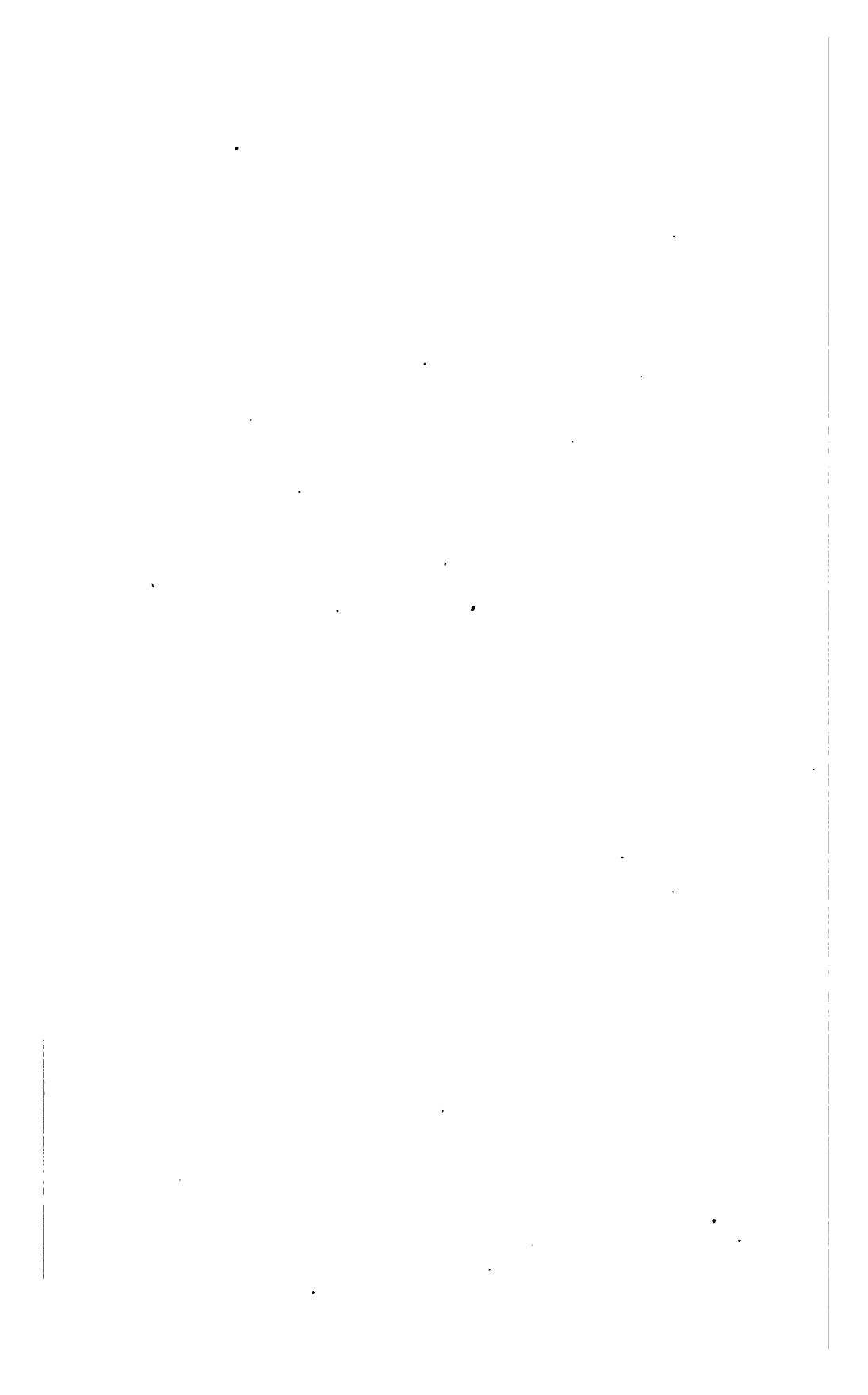
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*Young & Sawyer*

DECISIONS  
OF THE  
CIRCUIT AND DISTRICT COURTS  
OF THE  
UNITED STATES.

1863—1871.

THE HOME INSURANCE COMPANY v.  
STANCHFIELD.

*Circuit Court, Eighth Circuit; District of Minnesota,  
October T., 1870.*

INSURANCE.—INJUNCTION.—DISCOVERY.

A circuit court ought not to entertain a bill in equity filed by an insurance company, after a loss has occurred under a policy issued by them, to procure a decree canceling the policy and enjoining the insured from bringing any action upon it, where the bill is founded upon charges of fraud in obtaining the policy, which, if true, might be set up in defense of an action at law upon it. *So held*, where the policy contained a clause limiting the time for suing upon it to twelve months from the date of the loss; so that there was no danger of injury to the complainant through any unreasonable delay to sue.

*Query*, whether a circuit court within a State whose laws allow parties to examine each other upon a given cause of action or defense, ought to entertain a bill of discovery, merely in aid of such cause of action or defense?

Motion to dismiss a bill in equity.

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Home Ins. Co. v. Stanchfield.

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This bill was filed to obtain a decree canceling, on the ground of fraud, a policy of insurance issued by the complainants, and enjoining the defendants from bringing any action upon such policy.

The bill alleged that the complainants were a foreign insurance corporation, and that the respondents were citizens of the State of Minnesota. It then alleged that the corporation issued, on December 15, 1858, a policy of insurance, described in the bill, to the respondent Stanchfield, loss, if any, payable to Newman. It then charged that they were induced to issue the policy by reliance upon certain false and fraudulent representations, which were particularly set out, made by Stanchfield; and averred a loss of the insured building by fire; and alleged that the fraud practiced on the complainants was not discovered by them till after the loss, and shortly before the filing of the bill, and that they had tendered a return of premium, and demanded that the policy be delivered to them to be canceled, which had been refused.

The bill prayed for a temporary injunction to restrain the defendants commencing any action, in any court, upon the policy; and, further, that on the final hearing, the defendants might be decreed to deliver up to the complainants the policy to be canceled, and that it be declared null and void, and for general relief.

On the bill, and before answer, a temporary injunction was allowed by one of the judges of this court.

To this bill an answer was filed, admitting the issuing the policy, the loss, and the intent to sue upon the policy, but fully denying the alleged fraud and every allegation of false representations, or intent to defraud.

The defendants now moved, upon the bill and answer, for an order dissolving the temporary injunction. The motion was heard before Mr. Justice MILLER, of the supreme court, and DILLON, Circuit Judge.

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Home Ins. Co. v. Stanchfield.

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*Atwater & Flandrau*, for the motion.

*H. H. Finley and H. K. Davis*, opposed.

DILLON, J.—This is a bill in equity by the Home Insurance Company, of New York, to cancel a policy of insurance against fire, issued by them to the respondent, Stanchfield, and for an injunction to restrain him from commencing any action thereon. The policy was in the usual form of such instruments, and by its terms was to continue in force for *one year*, or until December 15, 1869. In November, 1869, the building covered by the policy was consumed by fire, and in the March succeeding, the present bill was exhibited. The nature of the bill appears above ; and it is, in substance, one to have the policy declared void because it was procured by the assured by means of false and fraudulent representations. A temporary injunction to restrain the respondents from commencing any action on the policy, was allowed before answer. On the coming in of the answer, which denies the alleged fraud and fraudulent representations, a motion is made to have the order for the injunction vacated ; and it is this motion which was argued by counsel and which the court is now to decide. But the solicitors for both parties desired the questions arising on the bill and answer to be disposed of on their merits, and to have the court determine whether bills like the present one are maintainable in equity, when the fraud alleged as a ground for the cancelation of the policy is available to the company as a defense to an action on the policy, and constitutes, if proved, a complete defense thereto.

Under the full denials in the answer of the fraud charged in the bill, there would be little hesitation in holding that the injunction ought to be dissolved ; but though dissolved, the bill would yet be pending, and the question as to the right to maintain such a bill would still remain to be determined.

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Home Ins. Co. v. Stanchfield.

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The complainant's solicitor maintains that the bill is sustainable upon two grounds : 1. Because a discovery is sought, and relief consequent upon the discovery. 2. Because courts of equity have jurisdiction concurrent with courts of law in matters of fraud, and will, in all cases, set aside agreements obtained by means of false and fraudulent representations.

Of these grounds in their order ; and first as to the discovery. This is not a bill for discovery in aid of a suit or defense at law ; and it is a bill of discovery only in the same general sense that every bill is such which seeks an answer from the defendant under oath. It is simply a bill calling for an answer under oath, and praying that a policy of insurance be set aside because it was procured by fraud. Bills of discovery had their origin at a time when *at law* a party was not entitled to and could not obtain the evidence of his adversary. By the legislation of Minnesota (*Stat.* 1866, 520) and by that of Congress (Act of July 6, 1862, 12 *Stat. at L.* 588 ; Act of July 2, 1864, 13 *Id.* 351), parties to suits at law, in equity and admiralty, are not only permitted to testify in their own behalf, but compellable to testify at the instance of the adverse party. The effect of this legislation is to remove the grounds or reasons which originally existed for bills of discovery ; and it may admit of doubt whether a bill merely to obtain a discovery in aid of another action or defense ought longer to be sustained ; but this is a point not now necessary to be determined. If the present bill be treated as one for discovery and relief, and as one where the necessity of obtaining a discovery is the ground of equity jurisdiction, the discovery sought has failed, for the answer denies all the essential averments of the bill charging fraud, and where this is the result the bill must be dismissed.

Speaking of such a case, Mr. Justice STORY says :  
" If the discovery is totally denied by the answer, the

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Home Ins. Co. v. Stanchfield.

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bill must be dismissed, and the relief denied, although there might be other evidence sufficient to establish a title to relief; for the subject matter is, under such circumstances, exclusively remediable at law." *Story Eq. Jur.* § 691; *Id.* §§ 74, 690. As to the first ground of equitable jurisdiction, viz: the necessity of a discovery from the defendant, it fails, because the complainant has failed to obtain the discovery which he sought. *Brown v. Swann*, 10 *Pet.* 497; *Russell v. Clark*, 7 *Cranch*, 69, 89; *Young v. Colt*, 2 *Blatchf.* 373.

We are thus brought to the main question argued by counsel, viz: Whether equity will entertain a bill to cancel a fire policy, filed *after* a loss has happened, where the foundation for the relief sought is the fraudulent representations of the assured in procuring the policy, with respect to the property, its ownership, value, the state of the incumbrances, &c., when such fraudulent representations are a good defense at law to an action on the policy, and available, as such, to the company.

If such a bill will lie, the present suit having been brought, and properly brought, the assured would not be allowed afterwards to sue at law on the policy, pending the equity suit to cancel it; and hence an injunction to restrain the commencement of such an action, if threatened, would be proper. But if, on the other hand, equity will not entertain such a bill as the present, of course the injunction should not have been allowed, and ought to be dissolved.

The injunction feature of the present suit is thus dependent upon the principal inquiry before us, and we shall give no separate consideration to it. The policy to which this suit relates contains two provisions, usual in such instruments, to which reference may be made, as bearing upon the question to be decided. One is that the loss, if any happens, is not payable *immediately*, but only after the preliminary proofs re-

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Home Ins. Co. v. Stanchfield.

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quired by the policy are furnished. The other is, "that no suit or action of any kind against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of *twelve months* next after any loss or damage shall occur," &c.

It may be here remarked that it is settled law that a condition in a policy requiring any action to be brought within a limited and specified time is valid and binding. *Ripley v. Aetna Ins. Co.*, 30 *N. Y.* 136 ; *Roach v. New York Ins. Co.*, *Id.* 546 ; *Carter v. Insurance Co.*, 12 *Iowa*, 287 ; *Gray v. Hartford Ins. Co.*, 1 *Blatchf.* 280.

It is our opinion that the present bill sets forth no sufficient grounds for equitable interference ; and we now proceed to state the reasons on which this opinion rests.

No principle is more familiar than the one that where the law affords a full, complete, and adequate remedy, equity will not interfere. "Chancery," says Lord BACON, "is ordained to supply the law, not to subvert the law." 4 *Bac. Works*, 488. In other words, the parties must litigate in the law courts, unless there are good or legal reasons for invoking the aid of equity. This principle or rule must have full effect given to it in the courts of the Union, for it is recognized by the constitution and by the judiciary act.

The constitution declares that "in suits at common law . . . the right of trial by jury shall be preserved." *Const. Amendt.* Art. VII.

And the judiciary act, in terms, provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy can be had at law." 1 *Stat. at L.* 82, § 10.

In the case before us, no reason is set forth in the

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bill showing that the insurance company needs the aid of a court of equity to relieve itself of liability on the policy. Before the bill was filed the loss had happened. By the terms of the policy the assured is bound to sue within a year, or be forever barred. The bill alleges that he is about to bring an action on the policy. If the facts averred in the bill are true, they constitute a complete defense to such an action, and nothing is set forth showing that any obstacles stand in the way of making this defense at law. If no loss had happened, and especially if the policy were one having many years to run, such as life policies, there would seem to be a necessity to sustain a resort to equity to cancel the contract, where it had been procured by fraud. But such is not the case now before the court. There are, however, other and perhaps more satisfactory grounds for not entertaining the present bill. The bill is one to have a contract made between the parties decreed to be delivered up to be canceled. This cannot be done without wholly taking the matter out of the law courts, and cutting off all actions in those courts. If this bill is not sustained, the parties are simply left to their legal rights and remedies. If no hardship, no injustice, will result, and no necessity appears for not leaving the parties to their rights and remedies at law, equity will leave them there. Now, it is well settled, to use the language of Mr. Justice STORY, that an application to equity, to have "instruments canceled or delivered up, is not, strictly speaking, a matter of right, . . . . but of sound discretion, to be exercised by the court, either in granting or refusing the relief prayed, according to its own notion of what is reasonable and proper under all the circumstances of the particular case." 2 *Story Eq. Jur.* § 693.

Chancellor KENT, in holding that a court of equity had full power to order instruments to be delivered up, whether void or not at law, and even if void on

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their face, after reviewing some of the leading English cases, says : " But, while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps," he adds, " the cases may all be reconciled on the general principle, that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate ; *and that the resort to equity, to be sustained, must be expedient*, either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult, or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation." *Hamilton v. Cummings*, 1 *Johns. Ch.* 517, 523, referred to by MARSHALL, Ch. J., in *Pearsall v. Elliott*, 6 *Pet.* 95.

Applying these principles to the present case, we do not deny that equity has jurisdiction, by reason of the fraud alleged, to entertain the suit, but are of opinion that it is inexpedient to exercise it under the case made by the bill. To leave the parties to their remedy at law seems to be a more reasonable and proper exercise of the discretion which the court has in bills to cancel contracts, than to retain the bill and exercise the authority asked. Because,

1. The company has a full, plain, and perfect defense to the policy at law, and no reason is shown why a resort to equity is either necessary, expedient, or proper.

2. Action at law on the policy must (as we have seen) be brought in a short, limited time after the loss. In the present case, only about seven months remained to the assured, and the bill alleges that he was about to bring suit ; the purpose of the present bill is, there-

fore, manifest, viz: to force the assured to litigate in equity instead of at law, thereby depriving the party of the right to a trial by jury.

3. If the bill be entertained because the insurance company has the right to resort to equity, then all similar bills must likewise be entertained in equity, and this gives the companies the advantage of a choice of forum. If the company prefers to litigate in equity, it will file its bill before the preliminary proofs are furnished, and thus compel the assured to settle the controversy in that court. If, on the other hand, the company prefers to litigate at law, it will simply omit to file a bill; and await the action of the assured, who, unless there is some special ground for going into equity, must be content with his legal remedies.

4. The effect of sustaining the present resort to equity, would be to transfer the great bulk of all litigation arising out of losses under policies, from the courts of law into the courts of equity. The business of insurance is now almost wholly carried on by companies of large capital, and these are, in most instances, foreign corporations. From the supposed sympathy of jurors in favor of the assured as against the insurance company, and from the supposed even-handed impartiality of the judge, it is not difficult to see that companies, having the choice of courts, would prefer the equitable to the legal forum in almost all cases. And the court must say that it is the result of its experience, in the trial of insurance cases, that the fears which the companies entertain as to the sympathy of the jurors in favor of the assured, have, by far, too much foundation. But the remedy lies in the more liberal exercise by the common law courts of the duty to grant new trials where verdicts are clearly wrong, and not in an extension of equity cognizance over controversies and issues in their nature essentially legal.

Having discussed the case on principle, it is due to

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Home Ins. Co. v. Stanchfield.

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its intrinsic importance, as well as to the importance which counsel attach to it, and the care with which they have prepared their arguments, that we should also examine it in the light of authority. All the cases referred to by counsel and others, have been examined. Many of them are meagrely reported, and very unsatisfactory, and some of them conflicting. The result of the examination is the belief that the weight of modern judicial opinion is in favor of rather than against the views above expressed.

It may be admitted that the early English cases below mentioned would favor the retention of the present bill, for equity seems then to have exercised a very free jurisdiction, and to have canceled policies with a liberal hand, even where there was a complete remedy or defense at law. Referring to this, Sir JAMES MANSFIELD, Ch. J., in a case before him, said: "Courts of equity formerly exercised an odd jurisdiction on this subject" (*Cousins v. Nantes*, 3 *Taunt.* 517); "alluding perhaps," says Mr. PHILLIPS, who quotes the passage, "to cases of interference by equity courts where there was an adequate remedy at law." 2 *Phill. Ins.* pl. 1933.

But at the present day insurance contracts are regarded by the courts as standing upon the same footing with other contracts, and there must be some good reason for a resort to equity with respect to them, else the parties, both insurer and insured, must remain satisfied with their legal remedies.

The true doctrine is stated by Mr. PHILLIPS (2 *Phill. Ins.* pl. 1933). He says: "Courts of law have the usual jurisdiction upon policies of insurance." After noticing the former course of the equity courts, he adds: "The limits of the jurisdiction in law and equity in respect to policies are now as well settled as in respect to any other species of contracts, the general jurisdiction being in the courts of law, with exceptions

upon the same grounds as other contracts." It is proper to observe that he subsequently says: "A court of equity is the proper tribunal to which to apply to compel the assured to surrender a policy, fraudulently obtained." *Id.* pl. 1938. And Mr. ANGELL adopts his language. *Fire Ins.* § 384. The material cases referred to by these authors, together with other cases, will now be briefly noticed, in the order of their occurrence.

In *Whittingham v. Thornburgh*, 2 *Vern. Ch.* 206, A. D. 1690 ; S. C., 3 *Eq. Cas. Abr.* 635, a life policy was obtained by fraud. After the loss, the court ordered the policy to be delivered up to be canceled, and a perpetual injunction against the verdict obtained thereon at law. This case is very briefly reported, occupying but a few lines. The grounds on which equity interfered, not only with the policy but with the verdict at law, are not stated. No point appears to have been made upon the jurisdiction in equity. In the report in 3 *Eq. Cas. Abr. supra*, it is said the answer confessed the fraud. In *Goddart v. Garret*, 1 *Eq. Cas. Abr.* 371, A. D. 1692 ; S. C., 2 *Vern. Ch.* 269, which was a bill to have a marine policy delivered up because the insured had no interest in the property covered by the policy, the court made a decree as prayed, although there appears no reason why the defense was not open to the insurer at law. No question is made or discussed as to the ground of equitable interference ; and this was the case cited by counsel when *MANSFIELD*, Ch. J., made the observation above quoted from 3 *Taunt.* 517, as to the odd jurisdiction formerly exercised by equity over policies of insurance. In *De Costa v. Scandret*, 2 *P. Wms.* 170 ; S. C., 3 *Eq. Cas. Abr.* 636, A. D. 1723, the assured fraudulently concealed from the underwriter information which he had that his ship was in danger. Without anything being said, in the very brief report of the case, about jurisdiction, Lord

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MACCLESFIELD, on a bill for injunction (against what does not appear) and relief, decreed the policy to be delivered up with costs. In *French v. Connelly*, 2 *Anst.* 454, 1794, which was a bill by underwriters for an injunction to restrain a suit at law, and for discovery and relief from the policy because obtained by fraud, the court overruled a general demurrer to the bill, and properly enough, for at all events the underwriters were entitled to a discovery to aid the defense at law. The next case which it is deemed necessary to notice is that of *Duncan v. Worrall*, 10 *Price (Exch.)* 31, 1821. In this case, a bill by the underwriters for an injunction against an action at law on the policy, and to have the same canceled because of false and fraudulent representations as to the neutral character of the property insured, "was dismissed on the ground that it was founded on matters which, if true, afforded a defense to the action at law, and therefore, there was no equity on the part of the plaintiff to warrant the interference of the court of equity."

The Lord Chief Baron RICHARDS alludes, in strong language, to his experience of over forty years respecting bills to stay actions on policies and to cancel them ; said he had never known one to have been brought to a hearing, and observed : "That Lord Chief Baron EYRE, who was always, we know, considered a strong-headed man, used to say that he considered bills for discovery and injunction by underwriters in these cases, as being filed, for the most part, merely with a fraudulent intention to create delay ; and I never remember one to have been acted on further than the dissolving the injunction."

*Fenn v. Craig*, 3 *Younge & C.* 216, 1838, also occurred in the exchequer, in equity. It was a bill by a life insurance company to cancel a policy on the life of a third person, obtained by the defendant by fraudulent representations as to the habits of the assured.

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The bill was filed promptly the next year after the insurance was made, and *before the death occurred*. It was held on demurrer that the bill would lie, ALDERSON, Baron, observing that the equity was strengthened because suit was brought in the lifetime of the person who was insured. This was right, and is not in conflict with the views expressed in the foregoing opinion, but rather coincident with them.

Thornton v. Knight, 16 Sim. 508, 1849, holds, that even after a verdict at law against a policy, equity will not entertain a bill to cancel it unless some equitable ground be shown, such as fraud. In India, &c. Co. v. Dalby, 7 Eng. L. & Eq. 250, 1851, the vice-chancellor, on a bill to restrain an action at law, overruled a demurrer to the bill on the ground that there was an *equity* stated against the action. It is not readily perceived what equity was stated not available as a defense to the law action ; but if an equity was alleged, the case is consistent with correct principle, viz: that equity will not interfere except where the remedy at law is inadequate, difficult, or uncertain.

The foregoing are the leading adjudications on the subject under consideration in England, and it is quite a significant circumstance against the present bill; that the American reports do not show that any similar bill has been filed.

The cases in the English books show that when bills are entertained, injunctions are refused or dissolved, thus leaving the real litigation to be had at law. If the verdict is for the policy, of course the bill is dismissed. If against it, then the bill may be brought to a hearing, and the court will, in proper cases, order the policy to be surrendered—an order which, after such a verdict, is quite unnecessary and useless. The English cases referred to are not, as before observed, very satisfactorily reasoned, and are not free from conflict. The old cases are entitled to very little respect as au-

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thority, and the modern ones tend to show that equity will not oust the law jurisdiction or interfere with the legal remedies where there is a full defense at law, and no obstacle in the way of making it. Insurance contracts should stand upon the same footing as other contracts with respect to equity interference, else we have an anomaly in the law without any reason to justify it. The result is that the motion to dissolve the injunction is well taken, and must be sustained.

MILLER, J., concurring in the foregoing result, observed :—"I am entirely satisfied with the opinion prepared by the circuit judge, both with the result and the course of argument by which that result is attained. I think the turning points of the case are, that the loss had occurred before the bill was filed, and that by reason of the limitation in the policy as to the time of bringing suit, and the allegation that the defendants were threatening to sue at law, there is no danger of indefinite delay, nor is there any other circumstance alleged warranting a resort to equity. In case such a bill were filed before loss, or, in the case of a life policy, before death, I am strongly inclined to believe it should be sustained."

Injunction dissolved.

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## WOODSON v. FLEET.

*Circuit Court, Fourth Circuit ; District of Virginia,*  
1870.

## REMOVAL OF CAUSES.—ACTION FOR MILITARY ARREST.

The operation of the acts of Congress authorizing actions commenced in State courts for acts done under authority of the president, or of any act of Congress, during the rebellion of 1861-65, to be removed to a circuit court,—explained.

A person sued in a State court for making an arrest in obedience to those claiming to be the municipal officers of the peace, and engaged in suppressing a riot, is not entitled to a removal of the cause to a circuit court,—under the act of March 3, 1863, 13 *Stat. at L.* 755, as amended by act of May 11, 1866, 14 *Id.* 46,—merely because, prior to the arrest, the military officers of the United States had issued an order recognizing the persons under whom defendant acted, as lawfully vested with the local government, and declaring that they would be sustained, in the exercise of such authority, by the United States; but not directing the arrest made, or commanding any particular acts.

Motion to remand a cause to a State court.

*W. W. Crump* and *Mr. Roller*, for the plaintiff.

*Bradley T. Johnson*, for the defendant.

CHASE, Ch. J.—In this case, we are not at liberty to look at the merits of the controversy between the parties. The only question which we have to examine is that of jurisdiction.

The suit was originally brought in the county court of Rockingham county, in the State of Virginia, by a

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citizen of the State against other citizens of the State; and involved, apparently, no question arising under the constitution and laws of the United States. It was removed from the State court into this court by an order of the circuit court of Rockingham county, in supposed conformity with the acts of Congress providing for such removal of certain suits for acts done in obedience to the orders of the national authorities during the recent war.

We are to inquire whether the suit thus removed is one of those for the removal of which provision has been made by Congress. If not, it is clear we have no jurisdiction of it, and it must be remanded to the court from which it came.

Two modes of removal were provided by the acts of March 3, 1863, 12 *Stat. at L.* 756, and May 11, 1866, 14 *Id.* 46,—one by transfer before verdict, another by appeal after judgment. It is not necessary here to consider the second mode. The first, under the act of 1863, was a proceeding by petition of the defendants, filed after entering an appearance; or if appearance had been entered prior to the date of the act, then at the next session of the court. Under the act of 1866, the proceeding for removal might be resorted to at any time before the impanneling of a jury to try the cause.

The suits which might be removed in one or other of these modes, according to the condition of the particular cases at the time of the proceeding for removal, were fully described in the two acts already referred to. If the suits now under consideration come within any description of these acts, they are certainly described by section 1 of the act of May 11, 1866. That description includes suits for any act done during the rebellion, by any officer or person, under any order issued by any military officer of the United States, holding the command of any district or place, within which

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such act was done by the person or officer for whom the order was intended, or by any other person aiding or assisting him therein. If this description does not include the act for which the suit in controversy was brought, it was not, as we think, within the meaning of either act of Congress. What, then, were the facts in relation to these suits? Two of the defendants were members of the town council of Harrisonburg. The other was the sergeant of the corporation, appointed by the council. The members of the council were elected during the war, while Harrisonburg was within the Confederate lines, and under the control of the insurgent government of Virginia.

The sergeant of the corporation was elected after all organized resistance to the national authority had ceased in Virginia, and after the State government, which had been organized at Wheeling, and recognized by the United States as the rightful government of Virginia, had been established in undisputed exercise of its authority at Richmond.

This suit was brought by Woodson against certain members of the town council of Harrisonburg, and against the town sergeant for malicious prosecution. The facts appear to be that he was arrested; that his case was examined with reference to further proceedings; and that he was discharged by the justice of the peace who conducted the examination.

The first question is: Whether that arrest, under the town council by the town sergeant, was an act done in pursuance of any order of the officer in command of the district? We have been referred to the General Order No. 10, issued from the post headquarters on June 16, 1865, by the military officer then commanding the district in which Harrisonburg was situated. It is to be borne in mind that the members of the common council of Harrisonburg had been elected to that office while the insurgent government of Virginia was in en-

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ture control of that portion of the State. When that government was dispersed by the superior force of the United States, the civil authorities did not necessarily cease at once to exist. They continued in being, *de facto*, charged with the duty of maintaining order until superseded by the regular government. Thus the common council of Harrisonburg remained charged with the government of the town, notwithstanding the temporary occupation of the place by United States forces. Doubtless such government might be superseded. The government of the United States was not bound to recognize any authority which originated under the rebel government. But it was not superseded. On the contrary, an order was issued, addressed to the citizens of Harrisonburg, Virginia, June 16, 1865, by which the citizens were notified "that the mayor and council of the corporation last in office, upon the resumption of their duties, will be sustained in all their acts consistent with existing laws and proclamations of the government."

Upon the promulgation of this order, the council, which had suspended its meetings, resumed its functions. It appointed a town sergeant, who was duly qualified. Shortly afterwards a riot broke out in the town, and the defendants, especially the mayor and the town sergeant, were very active in quelling the disturbance. We have no means of judging how great or how dangerous the disturbance was. It had no connection with the military occupation, nor any relation to the authority of the United States. It was an ordinary riot, and the mayor and town sergeant busied themselves in suppressing it. In doing so they arrested, rightfully or unrightfully, Woodson, the plaintiff in this suit.

Now, was that act done in pursuance of the order of the post commander? There was nothing in the order relating to any such matter. It was not addressed

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to the council. It did not require them to arrest anybody. It did not command them to suppress a riot. It simply declared that the council would be sustained in its legitimate action as the town government. It would be going too far, we think, to regard this arrest as an act done in pursuance of an order of any officer of the United States. On the contrary, it seems to us to have been an act intended, at least, as an ordinary exercise of authority by the town council and town sergeant under the laws of Virginia.

The courts of the United States have nothing to do with such matters. They are not constituted guardians of the public peace under State laws. On the contrary, these matters are left absolutely to the State courts. The State courts watch over personal rights and private security so far as these depend on State laws. Individuals who exercise local authority are responsible to them, and both are responsible to the people of Virginia.

We think, therefore, that this is not a case within the description of the act of Congress. We are clearly without jurisdiction of it, and must remand it to the circuit court from whence it came.

Order accordingly.

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## THE DUBUQUE.

*District Court, Eastern District of Michigan; June T., 1870.*

## REGISTRY OF VESSELS.—STALE DEMANDS.

A master has no lien upon the vessel for his wages.

Under the laws of the United States governing the registry of vessels, the person in whose name, as master, a vessel is registered, must be deemed her master for every legal intendment and purpose.

Where there is a master *de jure* by virtue of the registry, there cannot be, in contemplation of law, another master *de facto*. Another person employed by the owners to navigate and even to discipline the ship, does not become master in either sense. The relation of master is fixed by the registry.

An alien cannot, under the laws of the United States governing the registry of vessels, be deemed master of a vessel, even for the purpose of defeating his claim to a lien for wages.

An indorser upon a note not yet matured, gave a mortgage upon a vessel to secure his contingent liability. Afterwards, the liability became fixed. The mortgage, however, entitled him to an extension of time for payment. *Held*, that the mortgagee was to be deemed a mortgagee for a valuable consideration, and entitled, as such, to intervene for the protection of his interest,\* in a libel filed

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\* In the case of *The Old Concord*, decided by Judge LONGYEAR, in the district court for the Eastern District of Michigan, April, 1870, the general question of the right, under American admiralty practice, of a mere mortgagee to intervene and contest a libel for the protection of his interest, was considered. In that case, the propeller *Old Concord*, which had been arrested upon a libel *in rem*, was duly bonded by the claimant; but the libelants obtained an order remanding her to the custody of the marshal, on the ground that the sureties in the bond had become insolvent. Ward, who held a mortgage upon the vessel, given by the claimant and owner before the libel was filed, moved to vacate this order, on the ground that the court had no jurisdic-

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against the vessel to recover wages. Either the extension of time for payment of the debt, or the waiver by the holder of the note of the right to sue the indorser, and in such suit to attach the vessel, constituted a sufficient consideration for this purpose.

In respect to the question what delay to enforce a maritime lien will warrant its being postponed to subsequent liens acquired without notice, the same rule applies to claims for wages, as to claims for repairs and supplies.

The general rule is, that a delay to enforce a maritime lien, after a reasonable opportunity to do so, is deemed a waiver of the lien as against subsequent purchasers or incumbrancers in good faith and without notice, unless such delay is satisfactorily explained.

This was a libel *in rem* for wages of libellant as pilot and sailing-master of the propeller Dubuque, from April 5 to December 5, 1865, at one hundred and twenty-five dollars per month. The libellant claimed a

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diction over the vessel after she was once bonded. To this motion the libellants objected that Ward, being a mortgagee merely, and not the owner, or an agent, consignee, or bailee for the owner, within Rule 26 of the *Supreme Court Rules in Admiralty*, had no standing in court to make such a motion.

LONGYEAR, J., after observing that Rule 26 has been considerably altered and enlarged, if not entirely superseded by the act of March 3, 1847, 9 *Stat. at L.* 181,—*Held*, that the rule and the act relate exclusively to the conditions to be complied with to entitle a claimant to avoid an arrest of the property or to obtain its discharge after it shall have been arrested, and not to conditions necessary to entitle a party to intervene *pendente lite*, to participate in the distribution of proceeds, or to protect any interest he may have in the subject matter of the litigation. The right of a party to intervene for these purposes has been recognized both in England and in this country, as extending to judgment creditors who have acquired a lien, and also to attaching creditors. See 1 *Conkl. Adm.*, 55, 66-70. citing *The Flora*, 1 *Hagg.* 298, 803; *The Mary Ann*, *Ware*, 204. This being so, there can be no good reason why a mortgagee should not be admitted to intervene for protection of his own interest, and contest a forfeiture so far as his right or interest would be prejudiced by the decree.

The motion was therefore heard; and, upon the merits, was granted.

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balance due and unpaid of seven hundred and forty-nine dollars and fifty-three cents. The libel was filed and the vessel seized, February 13, 1869.

The answer of the Second National Bank, claimant, intervening for its interests in the proceeds of the vessel, as mortgagee, denied knowledge, &c., of the alleged services of libelant, and denied that there was any thing due him, or that any thing which might be due was a lien upon the propeller or her proceeds.

The answer further alleged on information and belief :

That libelant was in fact master of the propeller, and therefore could have no lien for his wages.

That soon after libelant left the vessel, and on December 8, 1865, he had a settlement with the owner, and received the owner's note in full for the balance due him for wages, and for another small claim he held against the owner, and in full for his claim against the vessel, if any existed.

That on October 4, 1866, John Hutchings, sole owner of said vessel, mortgaged the same to claimant for eleven thousand four hundred and sixty-two dollars and fifty-two cents ; that the mortgage was duly recorded on October 10, 1866, and there was due and unpaid upon the mortgage at the time of filing the answer the sum of nine thousand two hundred and fifty dollars ; that this mortgage was given for a valuable consideration, and without notice of libelant's claim ; and that the libelant's claim is stale, and ought not to be enforced as against the mortgage.

*Moore & Griffin*, for the libelant.

*Newberry, Pond, & Brown*, for the intervenor.

LONGYEAR, J.—The allegations of the libel as to the fact and period of service of libelant, and as to the rate

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of wages, are fully sustained by the proofs, and are not contested. The questions which are contested, and upon which the decision of the case must turn, will be taken up and disposed of in the order in which they are raised by the answer.

The first question presented is that raised by the allegation in the answer, that libellant was in fact master of the propeller, and, therefore, could have no lien for his wages.

The libel alleges that one George Moir was master, and the proof shows that the propeller was enrolled and licensed in his name as such.

Moir, then, was the registered master, or master *de jure* of the vessel, and he remained such during the entire term of service for which wages are claimed by libellant. But it is contended on behalf of respondent that libellant was in fact employed, and that he actually served as master, and, therefore, was master *de facto*, and that the vessel was registered in the name of Moir as master as mere matter of form, for the reason that libellant was then an alien, and could not be registered as master under the navigation laws. See Act of December 31, 1792, 1 *Stat. at L.* 289, § 4.

There was some evidence adduced tending to prove the above state of facts, which will be considered hereafter.

It is a well settled rule of the maritime law that the master has no lien upon the vessel for his wages. He must look to the personal responsibility of the owner alone. See 2 *Pars. Mar. L.* 582 ; 2 *Pars. on Shipp. & Adm.* 182, and the numerous cases there cited.

It is essential, therefore, to ascertain and determine in the outset, who was master. I shall consider this question, first, as one of law, and second, as one of fact.

In the absence of the registry laws, or in a case in which the registry laws have not been resorted to,

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there can be no doubt he would be master to whom the owner actually entrusted the navigation and discipline of the vessel. But how is it when, as in this case, the registry laws have been resorted to ?

The registry laws have for their object, among other things, the building up and fostering a commerce purely American. With this object in view, great importance is manifestly attached, and justly so, to the provision in regard to the designation of the master, and his political status. The owner is required to make oath who is master, and that he is a citizen of the United States. And this last requirement is deemed of so much importance that it is further required that if the master is within the district at the time of application for registry, he shall himself make oath to his citizenship. And in case the facts so required to be sworn to are not as stated, the severe penalty is imposed, in case of the owner thus swearing falsely, of a forfeiture of the vessel, together with her tackle, furniture, and apparel ; and in case of the master, of the sum of one thousand dollars.

The master is also required to join with the owner in a certain bond before registry can be obtained. In case of a change of such master, such change must be reported, and a corresponding change in the registry made, under the penalty, in case of neglect, of the registry previously made being made void, and of the payment of the sum of one hundred dollars by such new master.

In view of the importance thus attached by the law to the office of master, the registry certainly ought not to be treated lightly, as evidence of who is master. I think far the safer and more satisfactory rule is to hold that in case of resort to the registry laws, all the incidents of those laws attach, and that the relations required by the law to exist between the owner and the master, and between the master and the vessel, and be-

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tween the master and the crew become fixed by the registry, and any other arrangements the owner may make for the actual discharge of the duties of master are entirely subject to the relations so fixed, until they are changed in the manner prescribed by the registry laws; and that so long as the person in whose name, as master, the vessel is registered, continues to be master by the registry, he is such to all intents and purposes in the eye of the law.

In the case of *Draper v. Commercial Insurance Company*, 21 N. Y. 378, cited by respondent's counsel, the question was as to the seaworthiness of the vessel, as affecting the contract of insurance. It was there held that, as affecting that question, it made no difference if the person holding the papers as master was entirely incompetent to sail and discipline the vessel, provided the navigation and discipline of the vessel were intrusted in fact to a competent sailing-master; and that, although the registry is *prima facie* evidence as to who is master, yet it is not conclusive, as affecting the question of seaworthiness. Anything decided in the case beyond this is mere *dictum*, and not authority.

But I regard the doctrine upon which the decision is based as unsound, and if it was of binding authority upon this court (which of course it is not), I should not be inclined to extend its application one iota beyond the exact point decided. I consider the argument of the dissenting opinion of Judge Comstock in that case, even as to the point decided, sound, and, as it seems to me, conclusive. The dissenting opinion holds that the nature of the service admits of but one supreme authority, and the laws recognize but one; and that that authority is vested alone in him in whose name the vessel is registered as master, in virtue of his office; and in that opinion I fully concur.

Any other position opens the door wide to frauds upon the law, and at once renders the law of no force or

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effect whatever. If one person may be entered as master for the purpose of registry, and another be master in fact, whether a citizen or not, and without having executed the required bond, then the law may be violated with impunity, and the sooner it is taken from the statute book the better.

But it is said that Moir was incompetent in point of skill to navigate the vessel. That is a matter entirely between him and the owner, and between the owner and those who might have suffered on account of his incompetency.

The only qualification required by the act is, that he shall be a citizen of the United States. He was such citizen. He was made and recognized as master by the registry, and however incompetent he may have been to navigate the vessel, the entire crew, including libellant himself, were, in contemplation of law, subject to his orders.

It is further claimed that libellant actually discharged the duties of master. Concede that he did, still he did not possess the powers of master, such as the power to bind the vessel by his contracts, the power to inflict punishment for disobedience to orders, &c. These powers had been expressly conferred upon another, the person holding the papers as master, by law. See *United States v. Taylor*, 2 *Sumn.* 587.

Libellant's assumption of such powers would have been unlawful usurpation, and punishable as such under section 1 of the Act of March 3, 1835 (4 *Stat. at L.* 775). He was also capable of revolt under section 2 of said act. See *United States v. Winn*, 3 *Sumn.* 209, 216, 217. And he could not be punished as master for inflicting cruel and unusual punishments, &c., under section 3 of said act.

In the cases cited by respondent's counsel, holding that where the mate had succeeded to be master by the death of the master, he could not receive extra compen-

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sation as master on a libel *in rem*, but could recover as mate, *there was no master*. The duties and powers of master devolved upon the mate, it is true, but it was *ex officio* merely, and because he was mate. He did not cease to be mate when he was acting as master. In other words, he acted in a double capacity, in one of which, that of mate, he had a lien, and in the other, that of master, he had not. These cases decide simply this, that so far as libellant acted as mate, he had a lien, but so far as his claim was increased by his service as master, he had no lien.

As applied to the present case, these cases would sustain the following proposition : that so far as libellant acted as pilot and sailing master, he has a lien for his wages, but if any portion of his claim is for services as master, to that extent he has no lien.

But inasmuch as the vessel had a master, the duties of master could not have devolved upon him, as they did upon the mates in the cases cited ; and therefore the cases cited have no application to the present case.

In the case of *L'Arena v. The Exchange, Bee's Adm.* 198, cited by respondent's counsel, the ship had a real master, who of his own motion, acting in his capacity as master, hired a man at Havana to lend his name, to be used as nominal master to clear the vessel at that place, and to proceed to Charleston and back to Havana. It was there held that the person so hired never was master, and that therefore he had a lien for his wages. The real master had no authority thus to divest himself of his office and confer it upon another. This could be done by the owners only. Neither are we advised, and it is not material, what was the effect of the transaction at Havana, under the laws there in force. The effect of the registry under our registry laws is alone under consideration in this case.

I hold, therefore, that the person in whose name the

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vessel is registered as master, is master for every legal intentment and purpose.

That where there is a master *de jure* by virtue of the registry, there can be no master *de facto* in legal contemplation.

That the law recognizes in this respect but one supreme authority, and therefore, if another person than the registered master is employed by the owners to navigate and even discipline the vessel, he does not thereby become master either *de facto* or *de jure*.

That the relations between master and crew, as they exist by the maritime law and the acts of Congress, become fixed by the registry, and cannot be changed by any such interference.

There is, however, another complete answer to the objection of respondent, that libelant was master in fact. He was an alien, and was therefore prohibited by the registry laws from being master *de jure*. It would be against public policy, and aiding in the perpetration of the grossest of frauds upon the law, to hold that he could be master *de facto*.

As a question of law, therefore, the defense set up that libelant was master in fact, is not well founded.

I should be obliged to hold also, that this defense is not sustained as a question of fact. This is set up by the answer as matter of substantive defense, and must be maintained by respondent by a preponderance of proof. Hutchings, the owner, swears that he employed libelant as master, but that being an alien he could not be registered as master, and therefore it was arranged between him and libelant that the registry should be in the name of Moir (who was in fact engineer of the vessel), as mere matter of form.

Libelant testifies that he was employed expressly as pilot and sailing master, and that not a word was said about his taking or not taking the registry in his name

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as master, and that there was no arrangement or understanding to that effect.

The proof shows that in the discharge of his duties on board the vessel he did and assumed nothing more, with one or two unimportant exceptions, than what would be required of him acting in the capacity of pilot and sailing master.

Libelant and Hutchings stand on an equal footing as to interest and credibility, and neither is corroborated; and partly in consideration of the apparent fact that Hutchings must have sworn falsely when he swore that Moir was master of his vessel for the purposes of registry, or that he has sworn falsely in this suit, I hold that the evidence preponderates in favor of libelant's position, and that this defense is not made out in point of fact.

Libelant therefore has a lien upon the vessel for his wages, and is entitled to recover in this suit the balance due him, unless the remaining defenses set up, or some one of them, is made out.

The next defense set up is that soon after libelant's term of service had closed, and on the 8th day of December, 1865, he had a settlement with the owner, and received the owner's note in full for balance due him for wages, and for another small claim he had against the owner, and *in full for his claims against the vessel*.

The rule of law upon this point is that the lien is not waived by simply taking a note, unless it is distinctly so understood. See *The St. Lawrence*, 1 *Black*, 522, 531-2; *Carter v. Townsend*, 1 *Cliff.* 1, 5; *Sutton v. The Albatross*, 2 *Wall. Jr.* 327, 333; *The Fashion*, 1 *Newb.* 49.

The proof shows that a settlement was had and a note taken for balance due him at the time stated in the answer: but there is no proof whatever that it was understood that libelant's lien upon the vessel was thereby waived. This defense is therefore unsupported.

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I shall, however, notice this matter again in connection with the remaining branches of the case.

The next and remaining defense set up is, that on the 4th day of October, 1866, the vessel was duly mortgaged to claimant for a valuable consideration, and without notice of libellant's claim, and claiming that libellant's claim is stale, and ought not to be enforced as against the said mortgage.

The proofs fully sustain the allegations of the answer as to the giving of the mortgage, and want of notice of libellant's claim. As to the consideration, the proof shows that the mortgage was given by John Hutchings, sole owner of the vessel, to secure a previous indebtedness from him to the mortgagees of eleven thousand four hundred and sixty-two dollars and fifty-two cents, of which there remained due and unpaid at the time of filing the answer, the sum of nine thousand two hundred and fifty dollars. That the indebtedness of Hutchings grew out of indorsements of paper held by the bank. That the particular notes representing the amount for which the mortgage was given, were renewals of former notes, upon which Hutchings had in like manner been indorser. That these notes for which the mortgage was given did not fall due until October 26, 1866, and, therefore, Hutchings' liability had not become fixed at the time (October 4, 1866) the mortgage was given; but it does appear that his liability did afterwards become permanently fixed upon those notes.

On this state of facts the learned counsel for libellant contends: 1. That there was no consideration for the mortgage at the time it was given, as there was then no liability on the part of Hutchings to pay the debt. 2. That even if his contingent liability, having grown, as it did, into a fixed liability, constituted a sufficient consideration as between the parties, it is not a valuable consideration in the eye of the law so as to enable

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the mortgagee to set up his lien as against the lien of libellant.

1. As Hutchings' liability was contingent only at the time the mortgage was given, the security of the mortgage was, of course, also contingent; but when Hutchings' liability became fixed and absolute, then the security of the mortgage also became fixed and absolute. The mortgage was, therefore, good and valid, as between the parties, from and after the maturity of the notes, October 26, 1866, if not before.

2. The debt to secure which the mortgage was given fell due October 26, 1866, and Hutchings' liability to be sued upon it accrued at that time.

By the terms of the mortgage, the time of payment was extended, in all, to November 25, 1868, with provision for further extension. It is to be presumed that this forbearance would not have been given except upon the giving the mortgage security. This, of itself, constituted a valid consideration for the mortgage, and, it is fair to presume, was the principal motive of Hutchings in giving it.

Again. If the mortgage had not been given, and the time extended, the bank could have sued Hutchings upon the debt, and attached the vessel, or seized the same in execution. And a lien thus obtained has been recognized by high authority as sufficient to entitle the attaching creditor to intervene and contest a previous lien on the ground of laches. See *Blaine v. The Charles Carter*, 4 *Cranch*, 328; *Packard v. The Louisa*, 2 *Woodb. & M.* 48. There can be no sound reason why a lien voluntarily given for the same debt, should not be equally effectual.

It expressly appears in the proofs, that the mortgage was taken by the bank without any notice whatever of libellant's claim.

I hold, therefore, that the intervenor in this case is a *bona fide* mortgagee for a valuable consideration, and,

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as such, is entitled to intervene and contest the priority of libellant's lien.

It remains, therefore, to consider and determine the question of laches on the part of libellant in bringing forward and enforcing his lien.

In determining this question, the same rules apply to liens for wages as to liens for repairs and supplies. *Notes to Abb. on Shipp.* 539; *Leland v. The Medora*, 2 *Woodb. & M.* 104; *Allen v. The Buckeye State*, 1 *Newb.* 111, 114.

In the case of seagoing vessels, it seems to be pretty well settled that such liens will in no case be extended beyond the next voyage if they are unknown to the public, and new interests of third persons as to the vessel intervene without notice. This, however, can hardly be applied strictly to vessels navigating the lakes, where numerous voyages are made during each season, no one voyage occupying more than two or three weeks. But the principle is the same, viz: that such liens should not be enforced to the injury of parties who have acquired subsequent rights and interests in the vessel without notice, where there has been unreasonable delay in enforcing the lien; and it has been held in this district, by my honored predecessor, that, as a general rule, there is great reason to limit these tacit liens to the season of navigation, and not to extend them beyond one year, as applied to the navigation of the lakes. See *The Buckeye State*, 1 *Newb.* 111.

No fixed rule, however, can be laid down upon the subject. What will constitute unreasonable delay, must depend upon the circumstances of each particular case.

While liens for seamen's wages are the most favored in the admiralty, the policy of the law is that they should not be protracted beyond a reasonable oppor-

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tunity for their enforcement, to the injury of third parties acquiring subsequent liens without notice.

Perhaps the safest and most satisfactory general rule to be adopted, deduced from the authorities, and from the nature of the subject, would be that a delay to enforce a maritime lien after a reasonable opportunity to do so, shall be taken and deemed as a waiver of the same as against subsequent purchasers or incumbrances in good faith, without notice, unless such delay is satisfactorily explained. See *Packard v. The Louisa*, 2 *Woodb. & M.* 48; *Blaine v. The Charles Carter*, 4 *Cranch*, 328; *The Utility*, 1 *Blatchf. & H.* 218; *The Lillie Mills*, 1 *Sprague*, 367; *The Chusan*, 2 *Story C. Ct.* 456, 468; *The Buckeye State*, 1 *Newb.* 111.

In this case the service on account of which the lien is claimed, ended December 5, 1865, and the libel was filed February 13, 1869, three seasons of navigation having fully passed. In the mean time, about three days after the service ended, libellant had a settlement with the owner concerning his wages and another matter, and agreed upon a general balance due him, and received a part of the same in money, and the owner's note for the remainder. Nothing more was done by libellant until nearly the close of the next season's navigation, when the intervenors acquired their lien upon the vessel without notice of any claim on the part of libellant; and in this precise shape matters remained for upwards of two years and four months longer, before any attempt whatever was made on the part of libellant to enforce his lien.

During all this time the vessel was engaged in navigation upon the lakes, and where she might have been seized; and no explanation of the delay is attempted or offered.

It is difficult to conceive of an array of facts affording a stronger or more conclusive presumption that li-

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belant had waived his lien, and looked to the owner alone for payment.

The settlement and taking of the note is mentioned in this connection because, although not evidence of an express waiver of lien, it is an important link in the chain of circumstances going to prove a presumptive waiver.

The rights of the owner are not now under consideration, and the presumptive waiver of lien by libelant is held to apply only as against the mortgage lien of the intervenors. Therefore, if libelant desires to continue his suit as against the owner, a decree must be entered postponing his lien to the mortgage lien of the intervenors, and that such mortgage lien be first paid to the intervenors, together with their costs of suit to be taxed, out of the proceeds of the sale of the vessel. Otherwise, the libel must be dismissed, with costs to intervenors.

Decree accordingly.

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## THE HORNET.

*District Court; District of North Carolina, 1870.*SCOPE OF THE JUDICIAL POWER. — QUESTIONS AS TO  
EXISTENCE OF FOREIGN GOVERNMENT.

When a question arises, in judicial proceedings, relative to the existence or validity of an organization claiming to be the lawful government of a foreign country, the courts of the United States are bound by the decision of the executive power. Such a question is political, and not judicial, in its nature.

When a civil war is pending in a foreign country, between a portion of the people who adhere to a long established government, and another portion who assert a new government, the courts of the United States cannot recognize such new government, or admit it or its agents or representatives to a standing as parties in judicial proceedings, until the executive power has publicly recognized such new government.

## Application to interpose a claim, in admiralty.

The steamer *Hornet* was seized upon a libel of information, founded upon a charge of violating the neutrality laws. J. Morales Lemus, as agent of the so-called "Republic of Cuba," now applied to be allowed to intervene and interpose a claim and contest the suit. The only question now made was as to the propriety of allowing such agent to claim.

BROOKS, J.—The question submitted to the court is—can this court recognize as existing, any government or organized body of people, or element known as the Republic of Cuba, to the extent of allowing that as a body politic, or government to come through an agent

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into court, and be admitted as claimant of the property libeled in this cause?

The capacity of this struggling element in Cuba, styling themselves the "Republic of Cuba," to take and hold property is not a question for consideration. But it is now simply for this court to declare to what extent it may properly go (if to any extent), in declaring how far any revolutionary element or people have succeeded in their efforts to separate and free themselves from any established and acknowledged government.

I feel that I have been aided materially in coming to a correct conclusion upon this question, by the very clear and able arguments of the counsel who addressed the court—both for the United States and for the individual who styles himself the "agent of the Republic of Cuba;" yet I am embarrassed by the importance of this question, in its connection with this cause. Were I satisfied that my opinion would be revised by the supreme court, and be by that body corrected if wrong, I would announce the conclusion to which I have come with less reluctance than I do.

It was contended by Mr. Phelps, the counsel who submitted the argument on the part of the United States—that this court would exceed its power in recognizing to any extent, or for any purpose—the existence of any mere revolutionary body, such as that styling itself the "Republic of Cuba," in the absence of any act, resolution, proclamation of the legislative or executive department of our government, declaring or admitting to any extent, the existence of such a government. That there is no authority to show that such power was designed to be allowed the courts, or was ever exercised by the courts of the United States, but on the contrary there is abundant and conclusive authority—both of our circuit and supreme court, to show that they have not only declined to claim or exercise such power—but declared it to exist with and to have been

exercised by the political departments of the government alone. That a power or government must necessarily be recognized to have existence before they can be admitted as claimants to defend or be in any way heard in the court.

Other objections were urged by the counsel to the sufficiency of the evidence offered by J. Morales Lemus, to show that he was authorized to represent and claim for the Republic of Cuba.

This, like the question of title, the court regards as not now necessary to be considered.

I listened with care and much interest to the argument of the learned counsel who addressed the court in behalf of the party who asks to be admitted as agent, for the purpose of interposing a claim, and to the authorities read and commented upon by him.

I have examined the authorities cited on both sides, and considered these authorities and the arguments with care, and have been forced to the conclusion that this question is with the United States, and I must so declare.

I confess to some degree of hesitancy in so declaring, because, partially considered, it may seem as if it recognized to some extent, a right in the strong to deny justice to the weak. But, if anything should be yielded for such a consideration, it would be altogether unjustifiable on my part. Less defensible for me would such a course be for the reason that I entertain so clearly the opinion that courts have no right to consider any question of law submitted to them, in a policy view. Courts should construe the law—ascertain, and declare the law, as it is, without reference to any opinion of the judge, as to what the law *should be*.

Though no case parallel to this case has been cited, yet cases have been referred to and commented upon by the counsel for the government, which, in my opinion, conclusively settle this question.

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I will first refer to the case of the *United States v. Palmer*, 3 *Wheat.* 610. This was an indictment against the defendant and others, under the act of Congress, for robbery upon the high seas—in the circuit court for the district of Massachusetts. The judges were not agreed, and certified eleven questions for the opinion of the supreme court. That eminent judge, Chief Justice MARSHALL, delivered the opinion of the court. I will only refer to the remarks of the learned chief justice upon the tenth question so certified.

The question was certified in the following language. "Whether any colony, district, or people, who have revolted from their native allegiance, and have assumed upon themselves the exercise of independent and sovereign power, can be deemed in any court of the United States an independent or sovereign nation or government, until they have been acknowledged as such by the government of the United States; and whether such acknowledgment can be proved in a court of the United States otherwise than by some act, resolution, or statute of Congress, or by some public proclamation or other public act of the executive authority of the United States, directly containing or announcing such acknowledgment, or by publicly receiving or acknowledging an ambassador or other public minister from such colony, district, or people; and whether such acknowledgment can be proved by mere inference from the private acts or private instructions of the executive of the United States, where no public acknowledgement has ever been made; and whether the courts of the States are bound judicially to take notice of the existing relations of the States as to foreign States and sovereignties, their colonies and dependencies."

That great judge and the supreme court, declare as follows: "Those questions which respect the rights of a foreign empire, which asserts and is contending for

its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such sections of an empire who may be brought before the tribunals of this country are equally difficult and delicate.

"As it is understood that the construction which has been given to the acts of Congress will render a particular answer unnecessary, the court will only observe that such questions are generally rather political than legal in their character.

"They belong more properly to those who can declare what the law *shall be*; who can place the nation in such a position with respect to foreign powers as to their judgment may seem wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests the nation may engage itself with one party or the other—may observe absolute neutrality—may recognize the new State absolutely, or may make a limited recognition of it. The proceedings in courts must depend so entirely on the course of the government that it is difficult to give a precise answer to questions which do not refer to a particular nation.

"This court is of opinion that, when a civil war rages in a foreign nation—one part of which separates itself from the old established government and erects itself into a distinct government—the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States."

Then the same learned judge, in the case of *The Divina Pastora*, 4 *Wheat.* 52, decided at the next term of the supreme court, says that "the decision at the last term, in *United States v. Palmer*, establishes the principle that the government of the Union having recognized the existence of a civil war between Spain and

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her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful, those acts which war authorizes, and which the new government in South America may direct against their enemy." Hence I conclude that *for the reason* that the government of the United States had recognized the existence of a civil war between Spain and her colonies, the courts were forbidden to say that the act of capturing The Divina Pastora was unlawful. That the court could not say, after such an acknowledgment, if the capturing ship had come within the jurisdiction of the United States, that she was a piratical vessel, and treat her as such. That the effect of this acknowledgment was to accord to the new power belligerent rights, so far as the United States were concerned ; one of which is to grant letters of marque and reprisal, one of the important advantages arising from which (to such as act under them), is exemption from the penalty for piracy.

This is but saying to such a people that we see and understand that you are struggling to separate from the mother country.

That whether a revolted colony is to be treated as a sovereign State, even *de facto*, is a political question, and to be decided by the government, and not the court, has been decided in effect in several other cases than those before mentioned, as in *Kennett v. Chambers*, 14 How. 33 ; *Clarke v. United States*, 3 Wash. C. Ct. 101.

And in the great case of *Luther v. Borden*, than in the argument of which the great American constitutional lawyer rarely if ever displayed more learning, the supreme court unmistakably declared, against the view urged by Mr. Webster, that the federal courts have no jurisdiction of the question whether a government, organized *in a State*, is the duly constituted government in the State. That is a question which belongs to the political, not to the judicial power. In that case

any disposition of that question could not have disturbed our relation with any established foreign power. No power with whom the United States was at peace or to whom our government was solemnly pledged to a just and clearly prescribed course, as by our neutrality acts, could or would have complained of a contrary decision in that case—and still that was held not to be a question with the court.

How much the more reason in the conclusion to which our courts have come, and on which they have acted in relation to this subject, where even by possibility their action might involve our country in war with foreign powers.

There are other cases to which I might refer establishing in my view this principle.

I do not deem it necessary to refer to the other cases cited by the counsel for the government. It cannot be intended that such power should be vested in the courts. It would be a power dangerous to our government to be so vested, and one which judges could not so well exercise as Congress or the executive.

If the courts have the power to do any act which would in effect accord to this new government advantages, I do not see what limits there would be to the benefits which they might so confer, and the result might be that our nation would be involved in a war from the action of one judge, when the people and those who represent the people were disposed to peace.

If the courts, before the political departments had spoken, have the right to take one step in this direction, I do not see any limit to their power, short of declaring perfect freedom and independence.

What act has been performed, what resolution, declaration, or proclamation has been made by Congress or the executive, indicating an intention on their part to acknowledge, at any time or to any extent, the existence of the Republic of Cuba?

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This court knows of no such act, and nothing of that character has been shown or alleged by counsel. Then this court cannot know of the existence of such a government. Such knowledge is essential to the admission of this agent, as claimant for his government.

My time for the examination of this question has not been so ample as I could have desired.

Application denied.

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THE CAYENNE.

*District Court, District of Delaware; October T.,  
1870.*

## SALVAGE.—CASES OF DERELICT.

The true rule for awarding salvage in cases of derelict is this: Divide the proceeds which remain over all costs and disbursements of the salvage suit equally between the salvors and the owners of the rescued property, giving to each of these two interests a moiety.

Libel in admiralty in a cause of salvage.

The libel in this case was filed by John W. Hall and others against the Bark Cayenne, of Bordeaux.

HALL, J.—I have no difficulty in this case concerning matters of fact. According to my view, there need be no controversy in this respect.

The captain and crew of the sloop Joseph P. Comegys, returning from Boston to her port in Delaware,

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and being on Sunday, September 17, near the capes of the Delaware, observed the bark, the subject of this libel, in a place in the ocean where, to use the captain's words, it ought not to be. He, in consequence, approached it, to learn the cause. On coming near, it was hailed, and, returning no answer, the mate and one of the crew boarded it, and found it abandoned ; no person on board. Its sails were set, the bowsprit broken off near to the hull, and with the sail hanging down over the prow, and the vessel drifting at the rate, as supposed, of two miles and a half an hour, by tide and wind, toward shoals distant about eight miles. It was young flood ; and the captain believed it would be thrown by that tide upon the shoals unless prevented. I make no scrutiny of the grounds of this belief. If the captain and crew of the Comegys had not taken possession of this bark, Captain Marshall of the pilot boat might, and if the bark had not been taken by either of them, it might not have gone upon the shoals that tide. But this is needless conjecturing. If it had not been taken up by some salvor, it must have been lost. As respects the claimants, it is a saving by a salvor in a case of total abandonment ; they doing nothing, attempting nothing, to save it ; and, left in that condition, destruction was certain and soon ; it might have been delayed a short time.

I enter into no consideration of hardship or exposure on the part of the salvors. They have taken this abandoned bark and brought it into safe port, turning aside from their proper business, and incurring some inconvenience, exposure, and trouble.

This brings me to the question of allowance. The question has given me anxiety in every case of the kind before me, and I have decided it with distrust. I may add that the most satisfactory judgment I ever formed, I mean most satisfactory to myself, and which I trusted might be a precedent against extravagance

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preying upon the hard earnings of useful industry in misfortune, was reversed, and the allowance enhanced three-fold. It was the case of The Brig Carolina. She was a coaster from Maine. On February 1, 1857, she was lying within the Delaware breakwater. It had been a hard winter; the ice was breaking up in the river; the water was covered with floating ice. On February 1, one of the crew of the Carolina discovered a small leak in the starboard lumber port hole; it was found on examination that the shutter of this port hole had been injured, and it was believed necessary for the safety of the brig to repair this to secure it from being staved in by the ice. But the port hole was under water, and to repair it the lading of the brig must be shifted so as to raise this port hole above water. The flood tide had just begun. While it was running up there was no danger to the brig, but when running down it might drive the ice against this port hole, and the shutter could not stand heavy blows. The repair must be done during the running up of that tide, or soon after, before it became strong, running down. The crew of the brig could not shift the lading so as to raise the port hole above water in that time. They signaled a vessel near for help. She could not afford it. The steam tug America was lying near. She had been there several days, having gone there for employment in aiding vessels in need, and making profit by charges for assistance rendered. They signaled this tug for assistance, and she was alongside the brig in fifteen minutes. The day was pleasant; the water calm and smooth, and covered with floating ice. The crews of the tug and of the brig went to work to arrange the lading so as to raise this port hole above water; they threw heavy hogsheads of bone-dust into the water; removed some goods, value one thousand nine hundred and thirty-two dollars, on board the tug; they very soon perceived that they could easily raise

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the port hole above water in the necessary time. The tug had two calls during the day from vessels for assistance; these were attended to, the tug going to them, giving the required relief, and returning to the Carolina. About the middle of the afternoon the port hole was raised, one of the brig's crew repaired it, and the tug returned to her anchorage. There was no hurry, exposure, difficult work, nor any manner of danger, the working as comfortable as on a house floor—on the deck of a stationary vessel.

The first question on the facts was, whether this was salvage service, or common work in kind of service, which the tug had gone to the breakwater to render, and was profitably employed in rendering, as the reason why she was there and why she stayed there; the work being done under no present danger, but merely to guard against an evil which would happen unless prevented, and to prevent which this work was done in harbor, in fair, pleasant weather, on calm, smooth water. I came to the conclusion it was a salvage service, but of little merit, and I allowed six hundred and fifty dollars as compensation, more than three times the worth of the work and service. The decree was reversed, and about eighteen hundred dollars allowed.

This case, as all those cited, shows how judges differ, when they have no guide but their sound discretion, bringing vividly to mind the eloquent exclamation of Lord CAMDEN: "The discretion of a judge is the law of tyrants."

It is very important to have some rule to guide the judgment. It is not safe to be left at large to utter at random ten or twenty, as the words happen to come up.

There is certainly force in the reasoning of the counsel of the libelants, upon service rendered in the way of business, setting themselves apart to find employment in such service. This may have led to what is

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said to be the abrogation of the rule of allowing a moiety in cases of abandonment ; but I do not feel it necessary to enter into any special discussion of this point. There may be cases of abandonment, in which much less than a moiety should be allowed.

Salvage involves various considerations and principles indicating the allowance in the particular case. In that of the Brig Carolina, at the breakwater, the service was mere work and labor in shifting the lading to raise a port hole above water, for repairs ; requiring no exposure, hardship, or skill, but elevated to salvage by this repair being necessary for the safety of the vessel ; mere work in the line of employment of those doing it, without exposure or danger.

Another class of cases is of vessels in peril, where life must be periled to succor them. I have had such a case before me. A vessel driven without a person on board out of the Delaware bay, into the ocean, toward shore, in a frightful state of waves, under a tempest. A boat of pilots boarded her and saved her in those circumstances. The allowance was to remunerate exposure and boldness, and to encourage like service.

In no case is salvage a compensation for service on the principle of its value, *quantum meruit*. The case of the Brig Carolina came the nearest to that rule. I allowed three-fold the value of the actual service, and the chief justice of the United States increased the allowance from six hundred and fifty dollars to eighteen hundred dollars.

In the case before me, the governing element is the abandonment of the bark, in connection with the fact that it was taken up and brought safely into port by the libelants ; turning aside from their proper business certainly, with inconvenience and exposure, and more or less hardship,—the service being fairly and honestly rendered, and the bark and cargo saved. I make no estimate of the danger to the bark from her drifting.

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toward the shoals. It has very little bearing in the case, nor has the probability that she must be taken up. Captain Marshall of the pilot boat would have taken her if the Comegys had not; and if neither had taken her, it is very probable some other salvor would. I cannot see any effect on the determination of this case from such considerations. The claimants, or any one interested in the vessel or cargo, would not have recovered the property; they were not seeking it; so far as they are in the case, the bark and cargo would have been a total loss, if some salvor had not saved it. It was a total abandonment, and in that abandonment there would have been a total loss, if some salvor had not interposed; it is of no concern who that salvor may be; what the claimants receive will be as clear a gain to them as what the salvors receive will be to them; the claimants, what, so far as they were concerned, was abandoned to destruction; the salvors, their portion for saving the whole. This view indicates the principle of allowance: divide what remains over all costs and disbursements equally between the parties—to each a moiety. I think this is satisfactory to common sense and feeling of propriety.

It is argued, that principle of allowance has been overruled. I do not assert it as applicable to every case of abandonment, but as proper in this case—property abandoned to certain loss if not rescued by a salvor. Judges most highly respected have applied it. But *Post v. Jones*, 19 *How.* 150, is cited for this clause of the opinion of the court delivered by Judge GRIER: “We agree with Dr. Lushington, that the reward in derelict cases should be governed by the same principles as other salvage cases, namely, danger to property, value, risk of life, skill, labor, and the duration of the service;” “and that no valid reason can be assigned for fixing a reward for salvaging derelict property at a moiety or any given proportion; and that the true principle is

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adequate reward according to the circumstances of the case." To show how vague such rules are, I consider the principle on which I decide the amount precisely that of Dr. Lushington; I relying upon the circumstance, that this property was abandoned to total loss which, but for a salvor, must have occurred a governing circumstance. But when it is said "danger to property, value, risk of life, skill, labor, and the duration of the service," are governing considerations as in all salvage cases, let us look at this case of *Post v. Jones*. The ship *Richmond*, with a very valuable cargo of whale oil, the fruit of nearly three years' privation, exposure, and toil, was stranded on an uninhabited shore; the cargo must be lost unless three other vessels would take it home, distant twenty-seven thousand miles. These vessels, instead of generosity to distress, force a mock auction sale, where there was not a buyer but themselves, and purchase this cargo of oil, take it on board, bring it home, and insist on keeping it at their auction price. The court set aside this auction sale, declare the three vessels that took and brought home the oil salvors, allow a moiety for salvage, and also freight for bringing home the moiety of the *Richmond*. Who does not see that the principle of allowance was the loss of the *Richmond's* cargo in the condition it was, and saving it by the other vessels, when otherwise it would have been a total loss. The transferring of the oil to those vessels, and then transporting it home, was without danger, and required neither labor of any amount nor skill in any degree, and although there was a long distance, they must go home, and the taking of this oil accelerated their departure and diminished their exposure and danger, while freight on the *Richmond's* moiety was a source of clear profit. The conduct of the salvors, always of weight, was oppressive. The decision approves itself to our sense of justice; but it certainly does not overrule any decision of

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our judges. If I mistake not, it countenances the principle which I rest upon for the allowance I make. I add, I regard the decision of our judges upon their elaborate investigations worthy of deference, and to be followed in cases in this country in preference to the authority of a British court of admiralty.

Decree accordingly.

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THE R. E. LEE.

*District Court, Southern District of Mississippi;  
June T., 1870.*

CARRIERS.—LIABILITY FOR BAGGAGE.

The liability of a carrier of passengers, as such, for the baggage of a passenger, is limited to such property as is delivered to the care and custody of the carrier, or his agents and servants, during the transportation. It does not extend to articles which the passenger retains in charge.

Thus, where jewelry usually worn by two lady passengers upon a steamboat, as a part of their apparel, was left by them in their stateroom in a carpet-bag, with other articles of personal use, and was stolen while they were at supper,—*Held*, that the steamer was not liable therefor.

Libel in admiralty.

The cause was submitted upon an agreed statement of facts, the substance of which is stated in the opinion.

HILL, J.—This cause is submitted upon the following agreed facts :

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The libelants and their daughter took passage on the steamer against which the libel is filed, at New Orleans, for Vicksburg. They paid the usual passage fare, and delivered their trunks, &c., to the baggage master, and retired to the state-rooms assigned them, taking with them a small leather hand-bag, or companion, in which the ladies carried their combs, brushes, and articles of immediate necessity in traveling. In the evening, the ladies made their toilet for tea, leaving in the hand-bag or companion, jewelry usually worn on their persons, as part of their apparel, worth one hundred and five dollars. This companion was hung on a hook, on the side of the state-room. When the ladies left the room they closed the door, and on returning from tea found that during their absence some one had entered the room and abstracted the jewelry. Notice of the theft was immediately given to the officers of the boat, who made inquiries for the property, but did not recover any portion of it. Payment of its value was then demanded of the officers of the boat, but was refused.

Whether or not the boat was liable for the loss under these circumstances, is the only question to be decided. The amount claimed is small, but the question is an important one to travelers and common carriers, and therefore demands serious inquiry.

That the steamer is liable, as a common carrier, for the libelants' ordinary baggage, committed to the care of the officers in charge, is admitted; but that this hand-bag, or companion, with its contents, was committed to their charge, is denied by the respondent, and the facts, as stated, do not show that any actual delivery thereof was made, or intended to be made, but that it was retained by the ladies in their own possession.

The rule in England, and, perhaps, in this country, before the invention of steamboats and railroads, was

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very strict upon common carriers, and rendered them liable for the loss of the baggage of passengers conveyed by them; one reason given was, that often there was a conspiracy between the coachman and the robber; but under our recent modes of travel, this rule has been very properly modified, and the carriers are only held responsible for such portion of the passenger's baggage as may have been delivered to them, or to the agent whose business it is to receive and take care of the same. This delivery must be complete. See *Blanchard v. Isaacs*, 3 Barb. 383; *Kent Com.* 604; *Packard v. Gilman*, 6 Cow. 757. In *Tower v. Utica, &c. R. R. Co.*, 7 Hill, 47, it was held by NELSON, Ch. J., that a passenger who retains his overcoat in his seat, cannot recover against the company for its loss. Again, Mr. STORY, in his work on *Contracts*, § 766, holds that in this country, if a passenger does not surrender his baggage to the carrier, but retains it in his own possession, and it is lost, he cannot recover against the carrier therefor. Other authorities might be referred to, but these are sufficient.

I am referred by libellant's proctor to *Mississippi R. R. Co. v. Kennedy*, as sustaining the adverse proposition, but that is not a case in point. It is true, it holds that jewelry usually worn as part of personal apparel, does constitute a portion of a traveler's baggage, but in that case the trunk in which the articles were placed was delivered to the baggage master.

I am also referred for the same purpose to the case of *Macklin v. New Jersey Steamboat Co.*, reported in *Am. Law Reg.* 237. This case was decided by the court of common pleas, New York. This was a case in which the passenger was given the key of his stateroom, and took his valise with him. The substance of the ruling is, that this was a delivery to the officers of the boat, who, if they did not intend to become liable, should have notified him of the fact. The ruling of the

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court in that case, from the authorities cited, was based upon the older cases, and is not sustained by reason or the modern cases.

I am also referred to the case of *Epps v. Hinds*, 27 Miss. 657. This was a suit against an inn-keeper. The guest requested the inn-keeper to send his trunk to his room. The guest placed the money given him by his father to pay his traveling expenses and his tuition at the University at Oxford, to which he was going, in the trunk, and locked it. Some time afterward, the inn-keeper placed in the same room another guest, who, during the night, broke open the trunk, took the money, and left. The inn-keeper was properly held liable, or he had no right, after having assigned the guest to his room, to intrude another into it without his consent. Again, the trunk had been delivered to the inn-keeper, who was only requested to remove it to another room, and, if he was not willing to take the risk, should have notified the guest.

These cases, when properly considered, do not support the claim of the libelants. The baggage for which the carrier is responsible, must be such as can, with propriety, be placed in the baggage room, or must be delivered to the clerk of the boat, or some other officer authorized to receive it, and not such articles as the passenger necessarily keeps in his possession, such as the hand-bag or companion stated in this case. I am satisfied, from a careful examination of authorities, and the agreed state of facts, that the claim of the libelants in this case cannot be sustained. The libel will, therefore, be dismissed, at the cost of libelants.

Libel dismissed.

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United States *ex rel.* Lansing v. Treasurer of Muscatine County.

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UNITED STATES *ex rel.* LANSING v. THE  
TREASURER OF MUSCATINE COUNTY.

*Circuit Court, Eighth Circuit ; District of Iowa, 1870.*

MANDAMUS.—WHEN ISSUED.—HOW ENFORCED.

A circuit court has power, in a proper case, to issue a mandamus requiring State or municipal officers to proceed with the levy and collection of a tax.

When such a mandamus has, in the lawful exercise of the jurisdiction of the court, been issued, but the officer to whom it is directed will not, or cannot execute the duty commanded, the court may appoint its marshal to execute such duty and collect the tax.

Application for an order charging the marshal with the duty of collecting a tax.

This was one of several cases in which creditors upon bonds issued some time ago, by various counties in Iowa, in aid of railroad enterprises in that State, but remaining unpaid, had previously applied for and obtained writs of mandamus, requiring the proper county officers to collect taxes sufficient to defray the judgments which they had recovered upon their bonds. But these writs remained unobeyed. The creditors, therefore, now moved the court to appoint the marshal for the district of Iowa to execute the writs and collect the taxes, in place of the county officers.

*John N. Rogers, Grant & Smith, and Edmonds & Ransom,* for the motion.

*Rush Clark, D. C. Cloud, and Mr. Williams,* opposed.

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DILLON, J. — Heretofore judgments have been rendered in this court on what are termed railroad bonds and coupons against the counties of Lee, Washington, Louisa, Muscatine, Johnson, Iowa, and Poweshiek. To enforce the payment, writs of mandamus have at previous terms been ordered to be issued, commanding the proper county officers to levy and collect taxes sufficient to pay those judgments. At a term of this court held one year ago, it was shown that the county officers of most, if not all of these counties, had either neglected or refused to levy and collect the taxes required by the mandates of this court. On being attached for contempt they gave as a reason for their non-action, that the bonds upon which the judgments in this court had been rendered were, in the opinion of the State courts, unconstitutional, and that they had been enjoined by the State courts (in proceedings to which the judgment creditors were not parties), from making the levies which this court had commanded.

Following the express decision of the supreme court of the United States on the precise point, this court (Mr. Justice MILLER and Judge LOVE both being present and concurring), then held the State courts had no authority to enjoin or otherwise interfere with the execution of the process of this court; that injunctions issued from the State courts for that purpose were unauthorized, and in law afforded no protection to the county officers for their neglect or refusal to obey the process of this court.

But under the circumstances, the officers were discharged from actual arrest under the attachments for contempt, on the payment of costs, and on their promise to return home and levy the taxes required by the writs of mandamus.

The returns subsequently made to the court show that they did, as promised, make orders levying the

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taxes ; but in respect to some counties, particularly those of Lee, Johnson, and Muscatine, there is a showing made at this term that the taxes thus levied have not to any considerable extent been collected.

It has been made to appear to the court, that in Lee county, the efforts of the county treasurer to make the taxes have been practically defeated, and the same remain almost wholly uncollected. This has been brought about, in part, where personal property has been distrained by the county collector, by replevin suits commenced against him by tax-payers in the State courts. It is also shown that there are combinations made to prevent the attendance of bidders at such tax sales, and to deter them from bidding ; and in one instance, that an agent of one of the judgment creditors who attended at advertised sales of property was prevented by threats from bidding, and forced to leave by apprehensions of personal danger.

It also appears that since the decision of the supreme court of the United States, and also since the decision of the supreme court of the State to the effect that the process or officers of the Federal courts cannot be enjoined or interfered with by State courts, that one or more of the State district judges have issued injunctions against the collectors of Muscatine and Lee counties, undertaking to prohibit them from collecting the taxes which this court has ordered to be made ; and that such injunctions have been obeyed, and the collections practically prevented.

The county collector of Johnson county, in answer to an information filed against him, admits that he has not collected more than one-fifth of the levy ; that he is advised and believes that combinations have been formed to prevent the compulsory collection of such taxes ; that he finds it impossible, by reason of such combinations, to find responsible deputies to assist in making collections, and in view of these facts, he

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“asks the appointment of the marshal of this court to collect the said tax, or proceed under him (the county collector) to make such collection,” and for direction as to the interest and penalties he shall collect.

A sworn statement of similar character has been made at this term by the collector of the county of Muscatine, who also asks both the aid and direction of this court. Because the taxes have not been in fact collected in various counties in obedience to the mandates of this court, and because it is claimed that by reason of the facts before stated, and others not recited, that it is impracticable for the county collectors to comply with the writs of mandamus which have been issued, the judgment creditors of the various counties above mentioned have applied to the court for an order appointing the marshal to execute the writs of mandamus and make collections of the taxes. This is the question now before the court. That this court has the power to make such appointment, and that if the county officers either will not, or cannot themselves collect the taxes, that it is the duty of the court to appoint its own officers to execute its process, are points not longer open to controversy, because they have been precisely and definitely settled by the supreme court of the nation.

This is a power of a very delicate nature, and one which, although affirmed by the highest tribunal in the land to exist, we would not feel inclined to exert except in case of necessity. But when the necessity exists it is our duty, one from which there is no escape, to exercise the power. When does the necessity exist? Obviously when the county officers will not, or in consequence of public excitement, combinations, or suits in State courts, cannot execute the commands of the writs of this court to collect the taxes.

When a court issues its process it is bound to see that its lawful commands are neither disobeyed or

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evaded. That these writs of mandamus are lawful commands, and that the creditors of the counties are entitled to these writs, and also entitled to have them executed and obeyed, are no longer questions open to controversy, since they have been decided, not once simply, but time and time again by the supreme court of the United States. They are settled, and any inquiry whether the supreme court of the United States ought to have settled them otherwise, is fruitless, and without any practical value.

But this is not all that is settled. The supreme court of the United States has also decided that writs of mandamus are appropriate and proper process to enforce judgments against public corporations in this State ; that the federal courts have the power, and that it is their duty to issue such writs ; that they are in the nature of writs of execution, and that State courts have no more right to interfere with their execution than they have to interfere with the marshal when executing an ordinary *feri facias*. The court cannot question the correctness of these decisions ; and they are equally binding upon the State courts, because the decisions of the supreme court of the United States, as to the extent of the jurisdiction of the federal courts, and as to the validity and conclusiveness of their judgments, and as to what process may be resorted to to enforce them, and how such process shall be executed, bind Congress, bind all the federal courts, and bind also State legislatures and State courts and judges.

It so happens that every judge who is entitled to sit in this court is a citizen of this State ; and none of them have failed to express and manifest their sympathy, in all proper ways, with those counties and cities which have, unfortunately, become so heavily indebted.

It would be no act of kindness to the people of these counties and cities for this court to either ignore the decisions of the supreme court or refuse to carry out

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the principles which it has decided, for in the end, and before long, we too would be compelled to obey its mandates. It is the superior tribunal, and we have no choice but to obey and carry out its decisions.

Nor would it be an act of kindness to these cities and counties to pursue any course or to say or to do anything which would encourage the hope that any change of views on the part of the supreme court was possible, or that by any litigation there remained any chance whatever to defeat the right of the bondholders to recover and collect their judgments. After a careful study of the decisions referred to, and of the grounds on which they are placed, we feel bound to say, and think it important that the people should understand, that all hope of escape from them by means of further litigation, either in the federal or State courts, is without any sort of foundation, is wholly illusory, and will deceive whoever relies upon it. So far as the State courts are concerned, they are, for the reasons before stated, utterly powerless to afford any relief, since they have no right whatever to interfere with the federal courts or their process or officers.

As respects the counties of Lee, Johnson, and Muscatine, it is the opinion of the court, upon the showing made to it, that it is its duty to appoint the marshal to execute the writs of mandamus ; but in the two counties last named the marshal will not proceed to act unless it be shown to the court, or some one of its judges, that the county officer is disobeying the writ, or failing duly to cause the same to be executed.

In Lee county the showing made to the court is such as to entitle the relators to have the marshal appointed and directed to act at once.

It is proper to add, that this appointment will be rescinded whenever it is shown that the county officers are willing and able themselves to execute the writs of mandamus. It should be understood that the marshal

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is the officer of this court ; that he is not subject, in the execution of his official duties, to the control of any proceeding or process of the State courts ; that any interference with him is unauthorized ; that any resistance to him is an offense against the laws of the United States, and punishable as such in the courts of the United States ; and that it is the duty of the president to support him with all the power necessary to enable him to execute the process and orders of this court. The people of Iowa are law-abiding, and with this plain statement of what the law is, the members of this court gladly avail themselves of this occasion to declare that it is their firm conviction that the law will be respected and obeyed.

It only remains to add that the act of the Iowa legislature of last winter, discriminating especially against the taxes levied to pay judgments upon railroad bonds,\* is in contravention of the provisions of the national constitution prohibiting the States from passing laws "impairing the obligation of contracts."

This is plain upon a comparison of that law with the act in force at the time when the bonds were issued (*Code of 1851*, §§ 116-124 ; *Rev. of 1860*, §§ 252-260), especially when such comparison is made in the light of the decisions of the supreme court of the United States,

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\* Chapter 54 of the *Iowa Session Acts of 1870*, provides for the funding of county indebtedness. It declares that the supervisors of any county liable for an outstanding indebtedness exceeding five thousand dollars, may fund the same, and issue bonds of the county therefor. These bonds are salable by the county treasurer, at par, and the proceeds applicable to the county liabilities. Provision is made for the levy of a tax for the payment of interest, and ultimate redemption of the bonds.

Section 6 of the act then declares that the preceding provisions "shall not be construed to embrace the indebtedness of any county arising from bonds issued to aid in the construction of any railroad."

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expounding the constitutional provision above mentioned. *Van Hoffman v. City of Quincy*, 4 *Wall.* 535 ; *Bronson v. Kinsie*, 1 *How.* 316 ; *Butz v. City of Muscatine*, 8 *Wall.* 575 ; *Lee County v. Rogers*, 7 *Id.* 175.

LOVE, J., concurred.

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ALLEN v. MASSEY.

*Circuit Court, Eighth Circuit ; District of Missouri,*  
*April T., 1870.*

FRAUDULENT CONVEYANCES.—RIGHTS OF ASSIGNEE IN  
BANKRUPTCY.

Where household furniture in a dwelling inhabited by the owner and another person, was transferred by the owner to such other person, by bill of sale, and pointing out the property, but without any other circumstances to indicate an actual change of possession, and the parties continued to dwell together and to use the furniture, as before,—*Held*, the transfer was void against creditors, and under the statute of the State (Missouri) against fraudulent conveyances, as it had been construed by the supreme court of the State.

For the purpose of sustaining an action to set aside a transfer of property by a bankrupt as fraudulent against creditors, an assignee in bankruptcy is deemed to represent the *creditors*; and may impeach the transfer, notwithstanding it may be held valid and binding against the bankrupt himself.

Appeal from an order upon a petition of an assignee in bankruptcy.

In February, 1870, John A. Allen, as assignee in bankruptcy of William Downing, filed his petition in

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the district court for the eastern district of Missouri, setting forth that in October, 1868, Downing executed a bill of sale to Eliza A. Massey, one of the defendants, of certain household furniture then in his possession ; that the property was never actually delivered to her, but that the same has ever since been in the residence and possession of the bankrupt. The petition charged that by reason thereof the bill of sale was void by force of the statute of Missouri relating to fraudulent conveyances, and prayed that an order might be entered declaring the sale to be void, and the property delivered by the defendants to the assignee.

The answer admitted the execution of the bill of sale as alleged ; denied that the property was never delivered to Eliza A. Massey, and alleged that the same was purchased by her in good faith of Downing, and that the same had ever since been and still was in her actual possession.

The evidence adduced in the court below consisted of the bill of sale and the deposition of Downing.

The bill of sale, acknowledged, but never recorded, was dated October 31, 1868. By its terms Downing, for the recited consideration of three thousand six hundred and forty-five dollars, sold and conveyed to Eliza A. Massey "the following furniture and other personal property now owned by me, and *being in my residence* situated on the north side of Washington-avenue, being No. 1347, in the city of St. Louis ;"—then followed a detailed description of furniture in library, parlor, and bed-rooms, consisting of chairs, sofas, books, carpets, pictures, mirrors, &c.

The deposition of Downing, the bankrupt, disclosed the following facts :

That he had lived in house No. 1347, on Washington-avenue, above mentioned, for five years or more, and still lived there. The house belonged to him. Mrs. Massey was his sister-in-law, and she and her husband,

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John Massey, had lived with him and his family for over fifteen years, the two making from time to time an amicable adjustment of expenses. Downing's name was on the door-plate of the house, and the house and establishment were known as his. The furniture and property in question were his prior to the alleged sale to Mrs. Massey. Downing was engaged largely in business, but in October, 1868, his partner allowed a note of the firm to go to protest, and fearing the consequences, and desiring to secure to his sister-in-law three thousand six hundred and forty-five dollars, which he owed her, he made to her the bill of sale above mentioned, she being at the time in the house and living with him in the manner before stated.

It appeared that an inventory was taken of the property ; no separate valuation was, however, affixed to the different articles, but the whole was sold for the sum named. The chief purpose of the inventory was to enable the property to be described in the bill of sale which it was in contemplation to have drawn.

No act of delivery was testified to, except that the bankrupt says that he took Mrs. Massey around and showed the property to her.

It was admitted that the parties continued to live together as before in the house ; that no change was made ; and the property continued to be used as it previously had been ; that Downing's name still continued on the door-plate, &c., &c.

Upon this evidence Judge TREAT, before whom the petition was brought to a hearing in the district court, found that the bill of sale was void, and ordered the defendants to deliver the property therein described to the assignee.

From this order or decree the defendants now appealed. The appeal was heard before DILLON, Circuit Judge, and KREKEL, District Judge.

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*Daniel Dillon*, for appellants,—Cited *Stewart v. Lambe*, 1 *Brod. & B.* 506; *Benton v. Thornhill*, 7 *Taunt.* 149; *Ludlow v. Hurd*, 19 *Johns.* 220; 4 *Wend.* 514; *Waldoe v. Doll*, 29 *Cal.* 556; *Hamill v. Willett*, 6 *Bosw.* 534; *Funk v. Staats*, 24 *Ill.* 646; *Kenningham v. McLaughlin*, 3 *Monr.* 30; 7 *Id.* 99; *Born v. Shan*, 29 *Pa. St.* 292; *Hutchins v. Gilchrist*, 23 *Vt.* 82; *McVicker v. May*, 3 *Pa. St.* 224; *Clayton v. Brown*, 17 *Ga.* 217; *Bissell v. Hopkins*, 3 *Cow.* 166, and note, where the authorities are collected and reviewed, and the general rule with its twenty-four exceptions laid down; *State v. King*, 44 *Mo.* 239.

He also contended that as an assignee in bankruptcy stands in the place of the bankrupt, he cannot maintain an action to set aside a sale which would be binding upon the bankrupt.

*Hitchcock & Lubke*, for appellee.—I. The assignee had a right to the relief sought in his petition. *Hill, on Bankr.* § 43, pp. 134, 135.

II. The bill of sale was fraudulent and void in law under the statute of Missouri. *Gen. Stat. of Mo.* 1865, § 10, ch. 107, p. 440. *Claffin v. Rosenberg*, 42 *Mo.* 439, § 43, *Id.* 593; *State v. King*, 44 *Mo.* 238.

DILLON, J., delivered the opinion of the court.—I. Neither in his petition nor in argument does the assignee base his right to the relief demanded upon the ground that the bankrupt did not in fact owe Mrs. Massey the debt which the bill of sale was made to pay or secure, nor upon the ground that the sale was fraudulent, because made to hinder and delay the creditors of Downing, the vendor.

The assignee places his case solely upon the statute of the State of Missouri relating to fraudulent conveyances, the tenth section of which is in these words :

“Every sale made by a vendor of goods and chattels

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in his possession or under his control, unless the same be accompanied by delivery in a reasonable time (regard being had to the situation of the property), and be followed by an actual and continued change of possession of the things sold, shall be held to be fraudulent and void, as against the creditors of the vendor, or subsequent purchasers in good faith." *Mo. Stat.* 1865, 440, ch. 107.

The sale by the bankrupt to Mrs. Massey is within the statute. It was an absolute sale of goods in the possession of the vendor. There was no delivery of the property, or, if any, but a momentary one, and it was not followed by any actual or continued change of possession. This being so, the statute enacts that the sale "shall be held to be fraudulent and void as against the creditors of the vendor, or subsequent purchasers in good faith."

With the policy of a statute which, irrespective of the fact of fraud or the intention of the parties to defraud, inexorably denounces as fraudulent *per se* all sales not accompanied by the required delivery and by actual and continued change of possession, the courts have nothing to do, and it does not become them to question the legislative wisdom.

The purpose of the statute is to prevent the vendor from acquiring a false and delusive credit, and to prevent purchasers from being ensnared by means of secret sales.

Hence, the provision that the sale shall, as required, be accompanied with delivery, and this by an actual and continued change of possession. The purpose of the enactment being to protect the public from deception, the *indicia* of a change of owners should be such as to accomplish this end. The new owner should fly his own, and not his vendor's flag. This is the construction which the statute has received from the supreme court of the State. In *Claffin v. Rosenberg*, 42

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*Mo.* 439, speaking of this statute, WAGNER, J., remarks that "the vendee must take actual possession, and the possession must be open, notorious, and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands. . . . This necessarily excludes the idea of a joint or concurrent possession."

On a critical examination of the case just cited, it will be seen that the exact point of the decision is that the possession of the vendee must, as against the vendor, be actual and *exclusive*.

This is the leading case upon the statute in question, and it has been subsequently reaffirmed and followed. *Clafin v. Rosenberg*, 43 *Mo.* 593 ; *State v. King*, 44 *Id.* 238 ; *Lesem v. Herriford*, *Id.* 323. See *Twyne's case* and *American Notes*, 1 *Smith Lead. Cas.* 33.

We deem it prudent to observe that in the case at bar, it is not necessary to go so far as to say that in no case can a sale be upheld where the vendor is in possession concurrently with, or rather subordinate to, the vendee or his agent. This may depend upon the existence of circumstances of a nature fairly to put the public upon notice.

In this case there was no actual delivery, no continued change of possession, *no circumstances of any kind*, whereby either creditors or purchasers could know that any change of owners had taken place.

II. The defendants make a point that the situation of the parties to the sale and property was such that no delivery and change of possession other than such as were made was practicable, and hence more ought not to be required.

The statute refers to "the situation of the property," not of the parties ; but, without emphasizing this suggestion, it seems to us that the statute has reference to property so situated as not to be at the time capable of immediate actual delivery and change of possession,

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such as growing crops, bulky articles, &c., and not to cases where the property is present and capable of being delivered to the vendee and retained in his possession and control.

Since, in a case like the present, this court will follow the construction given to the local statute by the highest court of the State, it is not deemed to be necessary to follow the appellant's counsel into an examination of the decisions under the statute of Elizabeth or the statutes of other States.

III. The defendants also contend that even if such be the construction of the statute, the assignee has no right to impeach the sale and have the property delivered to him. This view cannot be maintained. If Downing had not gone into bankruptcy, any creditor of his could have subjected the property to the payment of his debt. In this respect the assignee represents the creditors. In consequence of Downing being adjudicated a bankrupt, his creditors are precluded from proceeding against him, and hence the assignee has the right given to him in terms by the bankrupt act, to proceed in the way which the present plaintiff is pursuing. *Carr v. Hilton*, 1 *Curt. C. Ct.* 233; *Hill. on Bankr.* 134, § 43, and cases cited; *Bankrupt Act of 1867*, §§ 14, 35.

The result is that the order of the district court must be affirmed.

KREKEL, J., concurred.

Order affirmed.

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Starkweather v. Cleveland Ins. Co.

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## STARKWEATHER v. THE CLEVELAND INSURANCE COMPANY.

*District Court; Northern District of Ohio, November T., 1870.*

## INSURANCE.—TRANSFER OF POLICY.—RIGHTS OF ASSIGNEE IN BANKRUPTCY.

A clause in an insurance policy declaring that the policy shall be void if assigned without the consent of the company, does not apply to a transfer made under the bankrupt law, by a register in bankruptcy, to an assignee appointed for the insured.

An assignee in bankruptcy does not acquire the beneficial interest in the assets, but is merely clothed with the title and control as agent for the bankrupt and his creditors, and for the purpose of converting them into money and applying them towards the discharge of the debts. The statutory transfer to such assignee is not within the purpose or operation of a condition in a contract, restricting alienation of the beneficial interest.

Petition in proceedings in bankruptcy.

*S. O. Griswold and S. Starkweather*, for the petition.

*Willey, Cary, & Terrell*, opposed.

SHERMAN, J.—The petition states that on February 7, 1870, Newton Wells, on the petition of his creditors, was declared by default a bankrupt, and that the petitioner was thereupon duly appointed his assignee. That on July 25, 1868, the defendants issued to Newton Wells, the said bankrupt, a policy of insurance in the sum of fifteen hundred dollars on his house in Concord, Lake county, Ohio, for the period of three years from that

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date. That on May 8, 1870, and within the life of the policy, but after Wells was adjudicated a bankrupt and the assignee appointed, the premises were destroyed by fire.

The answer of the insurance company does not deny the loss, or the sufficiency of the proofs, but bases its defense on two clauses in the policy which read thus : "If the title to the property is transferred or changed, this policy shall be void." And secondly, "If, without the written consent of the company, this policy shall be assigned, it shall be void." The direct question presented the court for adjudication is this : Is the assignment of the register to the assignee both of the policy and of the property insured, a violation of these two covenants in the policy, and does it exonerate the company from liability ? It is claimed by the petitioner that his assignment and transfer were not the voluntary acts of the bankrupt, but merely an assignment by operation of law, and that there is a broad distinction recognized by the authorities between the voluntary and the involuntary assignments and transfers of the policy and title. It is claimed by the defendants that a policy of insurance is a contract of personal indemnity, in no manner incident to the estate, nor running with it, and that the language of this policy is broader than the common and usual clauses against alienation, and includes in it any involuntary change or transfer of title.

It may be premised, that as the covenants in this policy are in restraint of alienation, and entail a forfeiture, they may be strictly construed. Though a contract voluntarily entered into by the parties, no other meaning should be given to the language used than a most rigid and literal interpretation permits. 15 *Johns.* 276 ; 2 *Wils.* 234. The clause against the assignment of the policy, and against the transfer and change of title, may be considered together. The rules that apply

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to either apply to both. These covenants are common to all insurance contracts. All policies have the same clause forbidding the assignment of the policy. The covenant against change or transfer of title in different policies varies somewhat in phraseology. In some policies the language used is, "Sold or conveyed, in whole or in part;" in others, "shall not be alienated by sale or otherwise;" or, as in this, "the title shall not be changed or transferred." All these expressions are in substance the same. To sell and convey, to alienate, or transfer the title, means an act whereby a thing is made another man's; an act whereby a change in the ownership of property is made from one person to another. And whether these words are used in the active or passive sense can make no difference in their construction. These covenants, therefore, on the part of the assured, are that he will not assign the policy, or in any manner change his title to, or the ownership of, the property insured.

It is not to be doubted that the petitioner, by virtue of the adjudication in bankruptcy, and his appointment as assignee, has the control of this policy and of the property therein insured. What rights and what title did he thereby acquire? Assignees, according to 1 *Bouv. L. Dic.* 132, are of two kinds: one in fact, and one in law. An assignee in fact is one to whom an assignment has been made in fact, by the party having the right to assign. An assignee in law is one in whom the law vests the right and control in the property. To the latter class an assignee in bankruptcy belongs. He is like an administrator, executor, or guardian, upon whom, when appointed by the proper authority, the law confers the right and power to control the property thus committed to his charge, paramount to all others. But it does not give to, or vest in him, the absolute ownership in his own right to the property. He is a mere trustee, accountable under the law to the

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*cestui que trust*. He holds the property assigned to him in trust—of all leases and policies, as well as other property. In leases with covenants against alienation without consent, &c., it has always been held that the leases pass to the assignee, and this is true of the bankrupt law. Nay, more ; it has been held (2 *Chitty*, 600), that in such case, the assent of the lessor to such assignment is to be presumed from the law itself. This doctrine is nothing but the simple enunciation of the principle laid down by Lord ELLENBOROUGH, in *Copeland v. Stevens*, 1 *Barn. & Ald.* 592. In substance, he declares that the assignee is a mere agent for the bankrupt and for his creditors. He says : “An assignment by the commissioners of bankruptcy is the execution of a statutory power given them for a particular purpose, namely, the payment of the bankrupt’s debts. Nothing passes from them, for nothing ever vested in them. Whatever passes, passes by force of the statute, and for the purpose of effecting the object of the statute. . . . . The object of the statute, and of the assignment, is the payment of the bankrupt’s debts, and the assignee is trustee only for that purpose.”

Again, in 9 *Vesey*, 100, and 13 *Id.* 186, the lord chancellor declares that assignees are not considered as having the same rights as purchasers for a valuable consideration, and that they are placed in the same class as personal representatives of intestates. Of course I need not quote authorities to show that Wells dying, this policy, notwithstanding its covenants, would pass to and vest in his administrator. From these cases the principle is clearly deduced, that an assignee in the case of involuntary bankruptcy is only a trustee, an agent, standing in the shoes of the bankrupt, with only power to do what the bankrupt ought to have done, namely, pay the debts out of his assets. By the provisions of the bankrupt law, the register makes the assignment, and not the bankrupt. The latter makes

no paper and performs no act to divest him of the title. But the control of the property, merely and solely by the judgment of the court, is taken from him and vested in the assignee, who has merely the power to do what the general as well as the bankrupt law requires, namely, to appropriate the bankrupt's property to the payment of his debts. In other words, that the assignee is a mere agent of the debtor to use his property in the payment of his debts. It therefore follows from this, that the bankrupt remains as much interested in watching over and guarding the insured property after as before bankruptcy, and that the assignee does not acquire such an interest in the policy, nor in the insured property, as to work the forfeiture contemplated by the clauses in question. *Phill. Ins.* 107.

This conclusion will be further strengthened by a review of the cases upon the effect of an involuntary act of bankruptcy upon the breaches of covenant in insurance and other like contracts. PARSONS, in his work on *Contracts*, vol. 2, p. 451, says: "On general principles, that where property, insured against fire, is taken into the possession of the law, for the benefit of creditors, the insurance will remain valid, until the property is sold by the assignee." The case of *Bragg v. New England Ins. Co.*, 5 *Fost.* 289, was a suit brought on a policy which contained a clause that, "If the property shall in any way be alienated, the policy shall be void." The property was mortgaged at the time, and this fact communicated to the company. During the life of the policy, the mortgage was foreclosed, and the property sold. But the court said, "that the title that became vested in the mortgagee by the foreclosure, was brought about by the operation of the law. There was no act of conveyance or transfer, by the mortgagor or mortgagee. We cannot therefore regard the foreclosure and sale as an alienation."

In the case of *Smith v. Putnam*, 3 *Pick.* 220, there

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was a lease of a farm, with a covenant not to carry off any hay under a forfeiture of ten dollars per ton. Hay was attached and carried off by the creditors of the lessee, and without his consent. In this suit for the forfeiture the court said "that the general principle to be deduced from all the cases was that covenants not to assign, transfer, &c., are broken only by a voluntary transfer by the lessee. That the removal of the hay, by sale or execution, was not a voluntary act of the lessee, and, therefore, no breach of the covenant." The leading case in England will be found in 8 *Term*, 57. Suit was brought on a lease, which contained a covenant that the lessee "should not set over, assign, transfer, or in any way dispose of the lease, without the written consent of the lessor." The lessee confessed judgment, and upon execution issued thereon the lease was sold. Lord KENYON said: "I adopt the distinction between these acts which the party does voluntarily, and those that pass *in invitum*. Judgment in contemplation of law, always passes *in invitum*, and, therefore, there is no breach." The same doctrine was held thirty years before, and will be found in 3 *Wils.* 234.

In the case of *Wilkinson v. Wilkinson*, 10 *Eng. Ch.* 258, a father by will gave his son the rents and profits of certain premises, with a proviso that if the son assigned or disposed of, or otherwise incumbered the property, he should forfeit the estate. The son afterwards became bankrupt. Sir W. GRANT, in deciding the case, says: "Now courts of law have held that an assignment by operation of law, which bankruptcy is, is not an alienation within the meaning of a restraint against alienation."

HILLIARD, in his work on *Bankruptcy*, p. 141, sums up the law in these words: "Property may be limited or leased to be void or revert back in the event of bankruptcy, and if a lease to a trader contain such a proviso, the term does not pass to his assignee, but reverts

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back. But to prevent its passing, there must be an express proviso to that fact. The usual covenant or proviso not to let, assign, or transfer, without consent, &c., will not be sufficient. The commissioners may still assign the lease to the assignees, without such consent, and such consent is presumed by operation of law. The distinction, however, is taken in England, that unlike bankruptcy, which is an involuntary proceeding, insolvency, being a voluntary proceeding on the part of the debtor himself, is a breach of the covenant against assignment, and works a forfeiture."

On these authorities, it seems clear to me, that the clauses in this policy forbidding its assignment, and the change and transfer of the title to the property, have no more effect than similar words in leases. Both are contracts between two persons, with this difference, that leases are under seal, and therefore of a higher nature. The cases cited establish the doctrine that bankruptcy and judgments are involuntary, and do not avoid covenants against assignments and transfers, either in leases or policies of insurance.

In this case, the bankruptcy of Wells, the owner of the policy and the property, was involuntary. By operation of the law the policy and the property were taken out of his custody and control, and placed in the hands of the assignee, as the agent of the law, to sell the same and pay his debts. The entire interest in the property is sold under the law by the assignee. The loss provided for in this policy accrued while the property was in this condition. It was still in law Wells' property, but by operation of law, in the hands of the assignee for the sole purpose of selling and applying the proceeds for Wells' benefit.

Decree for petitioner.

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*District Court, District of California; September T.,  
1870.*

## SHIPPING.—LIENS UNDER STATE LAWS.

A State statute,—such as chapter 6 of the Practice Act of California, declaring vessels subject to liens for materials or supplies furnished towards their construction, repair, or equipment, and directing that demands secured by such liens shall have preference in order of payment over other demands,—is valid and operative, even in its application to a domestic vessel supplied in her home port, so far as to entitle the holder of a demand within the statute to payment out of surplus proceeds remaining in the registry, after the satisfaction of maritime liens, in preference to a mortgagee of the vessel.

The successive decisions of the supreme court abrogating the practice of enforcing such liens by proceedings *in rem*,—reviewed and explained.

Application for distribution of surplus proceeds in a cause in admiralty.

HOFFMAN, J.—The question presented in this case is whether a material-man claiming a lien under the laws of this State upon a domestic vessel, is entitled to payment out of the surplus proceeds in the registry, in preference to a mortgagee of the vessel.

By chapter 6 of the Practice Act of California, it is provided that all steamers, vessels, &c., “shall be liable for supplies furnished for their use at the request of their respective owners, masters, agents, and consignees, and for materials furnished for their construction, repair, or equipment.”

The act further provides “that said several causes

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of action shall constitute liens upon all steamers, vessels, and boats, and have priority of payment in their order herein enumerated, and shall have preference over all other demands; provided, such liens shall only continue in force for the period of one year from the time the cause of action accrued."

If this statute be constitutional and operative, it is evident that the material-man has by law a lien and right to priority of payment in preference to all other demands; and that this right must be recognized by the court which has in its possession the surplus proceeds which remain after satisfying the maritime liens on the vessel.

From the time of the decision in the case of *The General Smith*, 4 *Wheat.* 438, the supreme court has held in numerous cases that no lien was created by the maritime law in favor of material-men supplying domestic ships in their home ports.

In respect to demands of this description, "the case is governed," says the supreme court, "altogether by the municipal law of the State, and no lien is implied unless it is recognized by that law." 4 *Wheat.* 438; *Peyroux v. Howard*, 7 *Pet.* 324.

It is further held that when such liens were recognized by the State law, they might be enforced in the district courts, according to the course of admiralty.

The 12th rule in admiralty, adopted by the supreme court in 1844, expressly provides that proceedings *in rem* shall apply to cases of domestic ships where by the local law a lien is given to material-men for repairs, supplies, and other necessities." No recognition could therefore be more emphatic of the constitutionality of the State laws creating liens of this description, and of the jurisdiction of the federal courts to enforce them.

The distinction too, between the rights created by the State law, and the remedy afforded by it, was also

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recognized—for the federal courts enforced the right by an admiralty proceeding, in the usual form, and not in the manner prescribed by the State law.

In 1858 the 12th rule was repealed, and proceedings *in rem*, in cases of domestic ships, for supplies, repairs, or other necessities, were prohibited.

The reasons for the repeal of the rule are given by the court in the case of *The St. Lawrence*, 1 *Black*, 522. The court says: "The State lien was, however, enforced, not as a right which the court was bound to carry into execution upon the application of the party, but as a discretionary power which the court might lawfully exercise for the purpose of justice, when it did not involve controversies beyond the limits of admiralty jurisdiction."

The court, after referring to the inconveniences of enforcing such liens in the admiralty, says: "Such duties and powers are appropriate to the courts of the State which created the lien, and are entirely alien to the purposes for which the admiralty power was created, and form no part of the code of laws which it was established to administer." (p. 531.)

We have here a distinct recognition of the right of the States to create liens on domestic vessels in cases where none exists by maritime law, and to enforce them by appropriate proceedings.

In the case of *The Belfast*, 6 *Wall.* 645, which is the latest decision on the subject, it is held that the States "may create these liens, and enact reasonable rules and regulations for their enforcement."

It is apparent, therefore—

1. That the contract of a domestic material-man is a maritime contract, and of admiralty jurisdiction.

2. That it may still be enforced in the admiralty by a suit *in personam*; and might constitutionally be enforced by a proceeding *in rem*, where a lien has been by the State law engrafted on the contract. But

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that on grounds of convenience this proceeding has been prohibited.

3. That liens created in such cases by State laws are valid, and the States may provide reasonable rules and regulations for their enforcement in their own courts.

It is contended that, as a necessary consequence of these propositions, the State legislatures have the right to authorize a proceeding *in rem* to enforce liens created by State laws, and not existing under the maritime law.

In support of this view, various authorities are cited : The *Circassia*, 50 *Barb.* 490 ; *Id.* 501 ; 4 *Ill.* 504 ; 4 *Mo.* 244 ; 41 *Id.* 491 ; 2 *Pars. Adm. L.* §§ 154-5 ; *Am. Law Rev.* July, 1870.

It is urged that in the cases of *The Moses Taylor*, 4 *Wall.* 411, and *Hine v. Trevor*, *Id.* 555, where a contrary doctrine is supposed to have been held, the liens attempted to be enforced in the State courts by a proceeding *in rem*, were not liens owing their existence solely to the State law, but were liens created by the general law maritime.

That the question before the court was as to the validity of a pretension avowedly set up by the State courts to exercise general admiralty jurisdiction concurrently with the United States courts of admiralty.

That the right of the States to authorize proceedings *in rem* to enforce liens created by State laws, was not in question ; and that the language of the court must be construed with reference to the circumstances of the cases presented.

That in subsequent cases the supreme court has explicitly declared the power and duty to enforce liens of this class to be appropriate to the courts of the State which created the lien (*The St. Lawrence*, *ubi sup.*), and that the States may provide for their enforcement, "by reasonable rules and regulations." *The Belfast*,

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*ubi sup.* That the proceeding *in rem* is the most speedy, appropriate, and effectual, if not the only practical means of giving effect to these liens. That to deny the right of the material-man to avail himself of that proceeding in a State court, and at the same time to decline to enforce his lien in admiralty, is to leave him without a remedy, and to reduce the declaration of the validity of his lien to an announcement of a formal proposition, unaccompanied by any substantial right, or available means of enforcing it.

The force of these suggestions is admitted. It has been recognized in the cases above cited. But in my opinion the answer to them is conclusive.

In the cases of *The Moses Taylor*, and *Hine v. Trevor*, the general principle is established that "when-ever the district courts of the United States have original cognizance of admiralty causes by virtue of the act of 1789, that cognizance is exclusive, and no other court, State or federal, can exercise it, with the exception always of such concurrent remedy as is given by the common law."

"This," it is announced in *Hine v. Trevor*, "must be taken as the settled law of the court."

It is also in those cases explicitly declared that a proceeding *in rem* is not a remedy afforded by the common law, and therefore not within the exception which saves to suitors such concurrent remedy as is given by the common law.

We have already seen that the contract of the domestic material-man is of original admiralty cognizance in the district courts of the United States. The case, therefore, clearly falls within the principle laid down by the supreme court. To interpolate into the doctrine as announced by the court, the exception in favor of proceedings *in rem* to enforce liens, attached by State laws to a certain class of maritime contracts, would not only be inconsistent with the language of the

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supreme court, and with the principles on which the decision rests, but would give rise to great embarrassments and perplexities.

If proceedings *in rem* are allowed in the State courts, to enforce the liens in question, all holders of maritime liens should be allowed to intervene and establish and enforce their claims according to their respective priorities. If the State courts proceed to adjudicate upon these claims, they will unquestionably be exercising admiralty jurisdiction, and might do so to any extent under cover of a proceeding initiated by the domestic lien-holder. If they decline to entertain such claims, how can justice be done?

Again: if the holder of the maritime lien should resort to the court of admiralty, a conflict of jurisdiction would ensue, for another tribunal, authorized to exercise jurisdiction *in rem*, would be already in possession of the vessel.

The State courts are necessarily bound to pursue exactly the provisions of the statute under which they acquire jurisdiction. In the California act six classes of cases are enumerated, in which alone liens are to be enforced, or, it would seem, recognized:

1. For services rendered on board vessels.
2. For supplies furnished to them.
3. For materials furnished in their construction, repairs, &c.
4. For wharfage and anchorage within the State.
5. For non-performance or mal-performance of any contract for the transportation of property or persons.
6. For injuries committed by them to persons or property.

These liens are declared to have priority in the order in which they are enumerated, and the provisions of the law embrace "all steamers, boats, and vessels"—foreign as well as domestic.

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When judgment is obtained against any vessel, the sheriff is directed to apply the proceeds of the sale :

1. To the payment of the wages of mariners, boatmen, &c.

2. To the payment of the judgment and costs.

3. To pay over any balance to the owner, master, agent, or consignee, who may have appeared in the action.

The rights of salvors, the holders of bottomry bonds, and perhaps of those who have advanced moneys to the master, seem thus to be wholly ignored, while an attempt is made to fix the respective rank of liens, some of which are confessedly maritime.

The sheriff is directed in all cases, after paying any claims for wages, to apply the proceeds to the satisfaction of the judgment—that is, the payment of the particular lien on which suit is brought. The balance he is to pay to the owner of the vessel.

Neither the bottomry bondholder or the salvor is authorized to intervene in the suit ; nor is either allowed by the statute to attach the vessel to enforce his demand.

No provision is made for any proclamation, publication, or other notice to parties interested in the vessel, except that a summons is to be served on the master, mate, or other person in charge. The vessel is seized under a process of attachment, and the other proceedings are to be conducted in the same manner as in actions against individuals. When judgment is recovered, the vessel is sold under an execution issued to the sheriff, and the proceeds are distributed as already stated.

The supreme court, in *The Moses Taylor*, considered the action authorized by the statute of California, “a proceeding in the nature and with the incidents of a suit in admiralty,” and observes that “the jurisdiction of the courts of California is maintained on the assumed

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ground that the cognizance by the federal courts of civil causes of admiralty and maritime jurisdiction is not exclusive, as declared by section 9 of the judiciary act of 1789."

It was to this claim on the part of the States to concurrent jurisdiction of admiralty causes, that its attention was chiefly directed.

It is unnecessary to consider whether the proceeding under the statute of California has all the incidents of a suit *in rem* in the admiralty, or to inquire what is the nature of the title obtained by the purchaser under an execution issued in such a proceeding.

It is decided "that the statute of California, to the extent to which it authorizes actions *in rem* against vessels for causes of action cognizable in the admiralty, invests her courts with admiralty jurisdiction," and is therefore unconstitutional. The statute has been referred to in this opinion to illustrate the difficulties which attend the exercise by State tribunals of any jurisdiction *in rem* or *quasi in rem* in cases of admiralty cognizance, and the reasonableness as well as policy of the simple and clear principle announced by the supreme court, that in all such cases the jurisdiction of the courts of admiralty is exclusive, except so far as a concurrent remedy exists at common law, and that a proceeding *in rem*, authorized by a State statute, is not such a concurrent remedy.

Nor is it true that if the right to proceed *in rem* in the State courts be denied to the material-man, he is left wholly without remedy. His lien may be enforced like any other mortgage, by appropriate proceedings.

The right of prior satisfaction out of the proceeds of the sale on execution against the owner of any vessel may be conferred on the material-man, by law, and his lien may be recognized and enforced in the distribution of estates of deceased persons, or of bankrupts. It may also be recognized by courts of admiralty, when dis-

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posing of remnants and surplus proceeds in the registry.

In these and other ways, the lien created by State laws may become effectual. And it is to be supposed that it was to provisions of this character that the supreme court referred when it observed that the States might enact reasonable rules and regulations for their enforcement.

This construction of the language of the opinion in *The Belfast* is more reasonable than to suppose that the court referred to proceedings *in rem*, and thus overruled the doctrine clearly announced in the *Moses Taylor and Hine v. Trevor*, that such a proceeding in a State court was inadmissible in any case of which the district courts of the United States have original cognizance, as an admiralty cause.

From the foregoing, it results that the State law is invalid only so far as it attempts to authorize actions *in rem*, against vessels for causes of action cognizable in the admiralty; but the validity of the lien itself, especially when given by the State law in general terms, without specific conditions and limitations, inconsistent with the rules and principles which govern implied admiralty liens, is, as is said in the case of *The St. Lawrence*, "undoubted."

It is urged that inasmuch as the remedy, by a proceeding *in rem*, afforded by the statute, is unconstitutional, the right is totally lost, and the lien created must be treated as non-existent.

But we have seen that the lien is created by the California statute in general terms. "The said several causes of action shall constitute liens upon all steamers, vessels," &c. A mode of enforcing these liens is provided, but it is not declared that this remedy shall be exclusive, nor that the courts shall refuse to recognize the liens except in the proceeding authorized by the statute.

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It is probable that in all the cases where, under the former 12th rule, liens conferred by State laws were enforced by the admiralty courts, those laws authorized a proceeding *in rem* in the State courts—or a suit against the vessel by name—but this circumstance did not impair the validity of the liens, nor affect the right of the admiralty courts to enforce them. A right which they still retain, though its exercise has been prohibited on grounds of expediency.

The New York statute, under which the supreme court held that an “*undoubted lien*” was acquired, provided, like the California statute, for an action against the vessel by name, and authorized a proceeding much more closely resembling a suit in admiralty. It results that the States have clearly the power to engraft upon causes of action cognizable in the admiralty, liens which, although they cannot be enforced in the State courts, by a suit in admiralty, or a proceeding *in rem*, are nevertheless valid, and should be recognized by this court in the distribution of surplus proceeds of any vessel sold to satisfy a maritime lien, or, by parity of reasoning, which have come into its possession under a proceeding in bankruptcy.

No question was raised at the hearing, as to the respective priorities of persons claiming liens under the State laws, and the holders of a prior mortgage recorded under the laws of the United States, for the claims of material-men which accrued prior to the date of the mortgage, are sufficient to absorb all the surplus proceeds in the registry.

The fund in court must, therefore, be applied, first, to the satisfaction of any maritime lien which has been proved.

Second, to the payment *pro rata* of the claims of material-men entitled to liens under the State law. An order to this effect will be entered.

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NOTE.—The foregoing decision, which seems to be the necessary result of the principles established by the supreme court, involves the anomaly of admitting the validity of a lien created by State laws, and at the same time denying the right to enforce it by the most appropriate and effectual means, viz: a proceeding *in rem*. This and other difficulties which beset the subject, owe their origin to early decisions of the supreme court, rendered at a time when the nature and extent of the grant of admiralty and maritime jurisdiction had been imperfectly investigated, and when the more liberal views with regard to the powers and duties of American courts of admiralty, which have since been adopted, had hardly been suggested.

In *The General Smith*, it was held that no lien is implied by the maritime law in favor of persons furnishing repairs and necessaries to a vessel in a port of a State to which she belongs.

The operation of the principle thus announced, was in some degree mitigated by subsequent decisions, which held that even in the case of domestic vessels, a lien created by State laws might be enforced in the admiralty.

This remedy being now prohibited, while the power of the States to authorize a proceeding *in rem* in their own courts, is at the same time denied, it seems not improper to revisit the foundations of the doctrine which has produced this anomalous result, and to inquire how far it is reconcilable with the maritime law and the recent and more liberal principles established by the supreme court.\*

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\* By the Roman law, the privilege of those who lent money to purchase, build, or repair a ship, was exclusively personal. It had no effect against those who were secured by express hypothecations. By the maritime law every privilege imported a tacit hypothecation or lien, which differs from an ordinary hypothecation in this, that the latter is governed by the date of the contract, while the privilege of the former is regulated by the degree of favor due to the particular claim. See *The Young Mechanic*, 2 *Curt. C. Ct.* 404.

The liens for seamen's wages, for moneys advanced on bottomry bonds, for repairs and necessities in the course of the voyage, are, therefore, preferred to that of a mortgagee prior in date.

If it be admitted that the domestic material-man has no maritime lien, and if the States have no power to create new maritime liens, or affect their priorities, the liens under the State laws will be regulated by their date, and not by the favor due them.

And thus, in the distribution of surplus proceeds in the registry, the court might be compelled to accord to a mortgage recorded under the laws of the United States, a preference over the claims of a

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"It is," Judge WARE observes, "a general principle of law extending to a great variety of cases, that a person who has by his own labor added a new value to a specific article, has a lien on that article for the value of his service. It is a right consonant to all ideas of natural equity, and is highly favored by law. 2 *Kent Com.* 496. The mechanic is considered as gaining a qualified property in the article when he has incorporated into it his own skill, care, and labor.

"Another general principle is, that when this sort of confusion of goods is produced at the request of the general owner, he that has given the last increment of value to the article is entitled to be first satisfied out of the common stock. In the nature and reason of the thing there is no difference in this respect between the mechanic and the coiner." *Poland v. The Spartan, Ware*, 188.

The right is recognized by the common law wherever the person claiming it is in possession of the article with which his labor and materials have been incorporated, and by the maritime law as giving rise to a privilege or right of prior satisfaction out of the thing itself, except where that privilege has been voluntarily renounced by an agreement incompatible with its exercise, or an exclusively personal credit has been given.

"There is nothing," says EMERIGON, "which is regarded with so much favor as debts for work and labor furnished to a vessel. Commerce and the country at large are interested in them. It is right that workmen and material-men should enjoy the real lien, which is given them by the '*Ordonnance de la Marine*.' They cannot be deprived of it, unless it is proved that they contracted on the faith of the person and not of the thing." *Emerigon, Contr. a la Grosse*, ch. 12, § 8.

In most of the States the defects of the common law have been supplied by statutes. The law of California gives to artisans, machinists, builders, mechanics, material-men, laborers, miners, &c., liens upon buildings, wharves, bridges, ditches, flumes, tunnels, sluices, machinery, aqueducts, &c., for which they have furnished materials or labor, and to enforce these liens, remedies partaking of the nature of a proceeding *in rem* have been provided. The decision in the case of *The General Smith* has also given rise to statutes, by which the rights of those who supply or repair vessels have received similar protection, and the supposed defect of the maritime law has been supplied.

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material-man, who might, subsequently to the mortgage, have, by his labor, imparted a greatly increased value to the ship. See *Scott's Case*, United States District Court, Northern District of Ohio, 1 *Ante*, 836.

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But this attempt to enforce rights so agreeable to our ideas of natural justice has proved in a great measure abortive. For the admiralty courts, though retaining jurisdiction of the contract *in personam*, decline to enforce the lien, and the State courts are without power to resort to a proceeding *in rem*.

That material-men,—that is, those who furnish material or labor in building or repairing vessels, or necessary supplies for their outfit,—have, by the general maritime law, a lien on the vessel for their security, cannot be disputed.

Article XVI. Liv. I, Tit. XIV. of the Marine Ordonnance places the lien of material-men who have furnished supplies, &c., before the departure of the vessel, in the third rank, postponing their claims only to those of mariners for wages, and those who have furnished money for the necessities of the ship during her last voyage.

The Ordonnance itself is said to have been “formed on the general jurisprudence of Europe, and for this purpose information was sought, at enormous expense, in all the ports of the continent.” Preface to *Valin's Com. on Ordonnance de la Marine*, p. 4.

It was at once adopted, by foreign nations, says VALIN, as an eternal monument of wisdom and intelligence, and it has ever since commanded the admiration of all civilians and lawyers, and has obtained the respect of every maritime State.

It therefore affords the highest evidence of the general maritime law, as administered in the admiralty tribunals of Europe, and derived from the ancient laws of the sea. See Appendix to 2 *Pet. Adm.* 1; *The Calisto*, *Daveis*, 81.

It is said by Mr. J. WARE (*The Calisto*, *ubi sup.*), that this principle of maritime law is not acknowledged by the common law, and has never been received by the commercial jurisprudence of England.

Undoubtedly the English common law courts hold that although by the maritime law every contract with the master of a ship implies a hypothecation, yet that it is otherwise by the law of England, unless expressly so agreed; and this doctrine has not only been recognized by the courts of chancery, and in the distribution of bankrupts' estates, but prohibitions have been granted to the court of admiralty to stay proceedings *in rem* to enforce the lien given by the maritime law. *Abbott on Ship*. 148, *et seq.*

But it is not true that the principles of the maritime law, with respect to these liens, were *never* adopted into the jurisprudence of England, or that the court of admiralty was always forbidden to enforce them.

In the articles drawn up in the reign of Charles I, to accommodate the differences between His Majesty's courts of Westminster and his

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court of admiralty, which were debated in the presence of the king and all the lords of his council, twenty-three in number, and which were agreed to by the judges of the courts at Westminster, and by the judge of the court of admiralty, it is provided :

" 3. If suit shall be in the court of admiralty for building, amending, saving, or necessary victualing of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm." Cited in *Ben. Adm.* 51; also in *De Lovio v. Boit*, 2 *Gall.* 249, note.

In 1648 disputes having arisen between the courts of common law and the court of admiralty, an ordinance was passed by the lords and commons assembled in parliament, defining the jurisdiction of the court of admiralty.

It provided "that the court of admiralty shall have cognizance and jurisdiction against the ship or vessel, with the tackle, apparel, and furniture thereof, in *all causes which concern the repairing, victualing, and furnishing provisions for the setting of such ships or vessels to sea.*" This ordinance ceased to be in force at the restoration. Prohibitions were again issued by the common law judges, and the admiralty, weary of the struggle, appears to have abandoned all further efforts to retain its ancient authority. *Ben.* 58.

Although the common law courts have thus finally succeeded in preventing the incorporation into the jurisprudence of England of the just and rational principles of the maritime law, with respect to the liens of material-men, yet it clearly appears that those principles were zealously maintained by some of her ablest lawyers, and even for a considerable time adopted and enforced by the court of admiralty, with the sanction of the king's council, and of all the judges, and subsequently under an act of Parliament.

The admiralty courts of America have long ceased to be governed by the arbitrary and irrational restrictions imposed by the common law courts of England upon the admiralty court of that country.

The maritime jurisdiction of the admiralty courts of the United States is, "that jurisdiction which commercial convenience, public policy, and national rights have contributed to establish with slight deficiency over all Europe—that jurisdiction which, under the name of consular courts, first established itself on the shores of the Mediterranean, and from the general equity and simplicity of its proceedings soon commended itself to all the maritime States; that jurisdiction, in short, which, collecting the wisdom of the civil law and combining it with the customs and usages of the sea, produced the venerable *Consolato del Mare*, and still continues in his decisions to regulate the

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commerce, the intercourse, and the warfare of mankind." *De Lovio v. Boit*, 2 *Gall.* 472.

The American courts of admiralty freely recognize and enforce the liens created by the maritime law in favor of shippers of goods, and of material-men who supply foreign ships.

In matters of tort, the jurisdiction is determined by locality, and in those of contract, by the subject matter; and it embraces torts committed upon, and contracts relating to the trade, business, and navigation of not merely the sea or tide waters, but of our inland lakes and great navigable rivers.

In the exercise of this jurisdiction, our admiralty courts are governed, not by the common law of England, but by the principles of the law maritime, as embodied in the ancient laws of the sea, as expounded by the great jurisconsults of Europe, and illustrated and adorned by the genius and learning of the English admiralty judges in those cases in which the bigotry of the courts of common law has suffered them to retain admiralty jurisdiction, and to apply the principles of the maritime law.

But the progress towards these enlarged and liberal ideas has been slow, and marked with occasional hesitation and inconsistencies. The influence of the decisions of the common law judges of England is still discernible in this branch of our jurisprudence. We adopt the principle of the maritime law which gives to the material-man a lien upon a foreign ship, and for this purpose we regard as foreign, ships, the owners of which reside in another State; but we refuse to recognize the lien of a builder or furnisher of a domestic vessel, although that lien is unquestionably allowed by the maritime law.

The received doctrine involves an even greater departure from the rules of that law, for it not only refuses to adopt them in the case of domestic material-men, but by admitting a liability *in personam*, enforceable in the admiralty against the owners, it violates its fundamental principles and analogies.

In the infancy of modern commerce, the master of a vessel was regarded as the *gerant*, or active partner of a *société en commandite*. His contracts bound himself, and operated a tacit hypothecation of the vessel. He could bind the property committed to his charge, but he had no power to engage the private fortunes of the owners, unless under a special authority for the purpose. The creditor being thus restricted to a particular fund, the maritime law permitted him to proceed directly against it in specie, and gave him a privilege or *jus in re* in it as against the general creditors of, or purchasers from the owner.

This principle, which appears to have been highly favored, and to have been recognized by nearly all the maritime codes of the middle ages,

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does not, says Judge WARE (*The Rebecca, Ware, 202*), seem to have reached England, or at least was not adopted there as a general commercial custom; but its justice and policy have been recognized in recent statutes of Great Britain and the United States by which the liability of owners is restricted in certain cases to the value of their interest in the vessel and freight.

The liability, therefore, of the owner on the contracts of the master was, as observed by EMERIGON, *real* rather than personal.

Article II. Tit. VIII. Liv. II. of the *Ordonnance de la Marine*, adopted in Art. 216 of the *Code de Commerce*, was variously interpreted by the commentators and the courts. VALIN held that the owner's right to be discharged from the obligations of the master, by giving up the vessel and freight, applied only to obligations arising from his negligence or torts. EMERIGON and POTHIER maintained that it embraced all obligations *ex contractu* as well as *ex delicto*. This question, after much discussion, was finally settled in France, in accordance with the unanimous demand of the commercial interests, and with the approval of all the courts, by the adoption, in 1841, of the amended article 216 of the *Code de Commerce*.

By this article the proprietor of a ship is made civilly responsible for all the acts of the master, and for the obligations contracted by him relative to the ship or the adventure. But he may in *all cases* discharge himself from these obligations by abandoning the ship and freight. *Rogron's Code de Com.* Liv. 11, Tit. 8, Art. 216.

This recent legislative interpretation in France of the provisions of the *Marine Ordinance*, is not cited as authority. But its unanimous approval by the French courts and juriconsults, so thoroughly versed in the rules, and profoundly imbued with the principles of the maritime law, may be received as high evidence of what that law is. And it serves to show how repugnant it would be to its fundamental principles to hold that the master may bind his owners personally by his contracts, to the whole extent of their private fortunes, or their "land goods," without binding the ship or creating any lien upon her.

It has been suggested that the lien of the domestic material-man is denied because he is presumed to have contracted on the personal credit of the owner. This is obviously not a reason, but merely a mode of stating the proposition. The presumption of an exclusive personal credit is, in the case of supplies furnished to coasters and the small craft which navigate our inland waters, in most instances untrue, in point of fact; nor can I perceive how such a presumption can now be indulged, for the supreme court, in the case of *The Belfast*, has decided that a maritime lien exists in favor of the shipper of goods, al-

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though the voyage is to be performed wholly within the limits of the State of which all the parties are residents.

If the freighter of goods on one of our river steamers, or the deck-hand, is not deemed to have contracted on the personal credit of the wealthy corporation which owns the line, with what reason can the mechanic who has repaired a steamer be presumed to have done so?

The same remark applies to cases of pilotage and towage, which are generally admitted to give rise to a maritime lien irrespective of the residence of the owners of the vessel.

The attempt to mitigate the effects of the doctrine we are considering by treating the States as foreign to each other, and regarding vessels as "domestic," only when in the ports of the State where their owners reside, will be found, not only to give rise to insuperable difficulties, and to lead to absurd consequences, but to rest on very unsatisfactory grounds.

A few illustrations will expose its practical operation. If, for example, a person who resides in New York, where his business and credit are established, sends a vessel to be repaired in Jersey City, the mechanic will be allowed a lien, while if he sends her to Brooklyn no lien will be implied. But if the same person should in the succeeding year fix his residence in Jersey City, though he still carries on his business in New York, the case will be precisely reversed.

So if one owns a vessel navigating the lakes, the mechanic will be denied a lien for repairs made at Buffalo, if the owner resides anywhere in the State of New York, while the lien will be allowed if the repairs are made at Jersey City on the order of any New York owner, no matter though he be the wealthiest and best known merchant or corporation of the city.

So, if a vessel be owned by two persons, one of whom resides at New Orleans and the other at St. Louis, between which ports the vessel plies, and at each of which the resident owner conducts her business, is the vessel to be deemed to "belong" to Missouri or Louisiana? At which of the termini of the voyage is the mechanic who repairs her to be allowed a lien? At both, or at neither?

In truth, the notion that vessels *belong* to the State where the owners happen to reside, or that they are to be treated, when in a port of that State, as "*domestic* vessels," seems to have been adopted on insufficient consideration.

All registered and enrolled vessels are vessels of the United States, and whether navigating the ocean, the lakes, or the great rivers of the country, are subject to admiralty jurisdiction, both in matters of tort and contract. Congress has regulated not only their registry and enrollment, and the mode in which they may be transferred and mort-

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gaged, but has also, especially in the case of steamers, prescribed rules for their equipment and furniture, and for the transportation of passengers, and has subjected them to inspection by United States officers, and provided for the licensing of the pilots and engineers. They are, thus, vessels of the United States, and are all domestic vessels, belonging to citizens of the United States.

The classification, therefore, of vessels as domestic and foreign, or quasi-foreign, according to the residence of the owner within or without the State at a port of which they have been repaired or supplied, seems arbitrary and unsound. Especially when this classification is resorted to in but a single case, and for the purpose of excluding a lien allowed by the maritime law, and which has the most solid foundation in natural justice. *Ben. Adm.* § 278; *The St. Iago de Cuba*, 9 *Wheat*. 409.

Our attention has thus far been confined to the broad doctrine that no lien is implied by the maritime law in favor of domestic materialmen, although the supplies have been ordered by the master with the owner's consent, or by the owner himself,—and when the personal liability of the owner is admitted. It may be said, however, that the master's authority ceases on his arrival at the port of his owner's residence, and that unless expressly empowered by the latter, his contracts ought not to bind the vessel.

But this restriction upon the master's authority could, at most, be imposed only when the vessel is in the place where her owner resides—her home port. "An epithet which," says Mr. Chief Justice MARSHALL, "has no necessary reference to State or other limits." *The St. Iago de Cuba*, *ubi sup.* On principle, the determination of the master's agency should depend on the readiness with which the owner may be consulted, the urgency of the necessity for repairs or supplies, the authority, real or apparent, which the owner may have held him out as possessing, and the means which third persons may have possessed of ascertaining the extent of the powers confided to him.

In this view, the mechanic, who at the master's order, repairs, in Jersey City, a vessel belonging to a wealthy and well known merchant or corporation of New York, should not be entitled to recourse against the vessel, or her owners, any more than he who makes like repairs in Brooklyn; while conversely, the New York mechanic should, under certain circumstances, have both remedies, notwithstanding that the owner may reside in a remote part of the same State.

The taking of goods on freight, the shipping of a crew, the procuring supplies for them and the vessel, as well as the making of ordinary repairs, is within the usual scope of the master's duty and authority. See *Curt. on Mar. Seam.* 127. On general principles of

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agency, the owner, and *a fortiori* the ship, should be bound by his contracts, unless notice, actual or constructive, be clearly brought home to the person with whom he deals, that he is exceeding the limits of his authority. And on the principles of the maritime law, the liability of the vessel, at least, for the contracts of the master, would seem unquestionable. In article 216 of the *Code de Commerce*, which, as before stated, was taken from the *Marine Ordonnance*, the liability of every owner for the obligations of the master, up to the value of the vessel and freight, is established. Under this article it is held that the ship is liable, even though the proprietor or general owner is not *armateur* or owner for the voyage. *Rogron, Code de Comm.*, Art. 216.

And so is our own law. For the vessel is liable *in rem* to seamen, freighters, &c., on the contracts of the master, although she may have been demised or chartered to one who appoints the master, and whose agent he exclusively is.

Article 232 of the *Code de Commerce* provides for the very case we are considering. This article, which is taken from Article XVII. Liv. 11, tit. 1 of the *Ordonnance*, enacts that the captain shall not *in the place of residence (dans le lieu de la demeure)* of the owners or their agent, without special authorization, cause repairs to be made, buy sails, cordage, &c., or take up money for the purpose.

Under this article it is held that, if the captain should violate it, the proprietors would nevertheless be bound under article 216, to the extent of their interest in the vessel, *i. e.*, the vessel would be liable, except for money taken up on bottomry.

The remedy of the owner is against the master for violation of the article; but even this, says VALIN, should be subject to his right to be allowed for absolutely necessary supplies, obtained for a reasonable price, however blamable he may be for having acted without authority. 1 *Valin's Com.* p. 440. Chapter 54 of the *Consolato del Mare*, and the observations of VALIN and EMERIGON upon it (1 *Valin's Com.* p. 869; *Emerigon Contr. a la Grosse*, Hall's Translation, 227), illustrate the favor with which the maritime law regards debts due for work and materials furnished to a vessel.

Both of these great jurisconsults agree that workmen employed by a master carpenter or caulker, who has contracted with the owner, shall have a lien on the vessel for the sums due them, unless they have received actual notice of the arrangement between the owner and contractor.

On this, which is an admitted exception to the ordinary principle of *domino non mandante*, EMERIGON observes:

"The carpenters, caulkers, and other workmen employed in build-

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ing, together with the creditors for the timber, cordage, and other articles furnished, ought to enjoy the privilege allowed to them, unless they have been warned in due time that if they do not secure the payment of their claims against the contractor, they shall have no lien on the ship. And I do not believe that a simple registry of the contracts would be considered as a notification, within the meaning of the Consolato, which requires that notice should be given to the workmen and other material-men, in order that they may not be deceived." *Emerigon Contr. a la Grosse*, 229.

If the ship is thus liable to workmen employed by a contractor, and not by the owner, or master, unless warned by the latter, *a fortiori* should she be liable to workmen employed by the master, unless affected by a similar notice. See ch. XXXII. and XXXIII. *Consulat de la Mer*, par Boucher, tom. 11, 38-9.

It is thus evident that by the principles and analogies of the maritime law, and the "good customs of the sea" ("*les bonnes coutumes de la mer*," as they are called in the Consolato), and on grounds of equity and natural justice, the lien of the material-man who has constructed, repaired, or supplied a vessel, ought to be recognized and enforced as a maritime lien by courts of admiralty. And this whether the work has been done in a port of the State in which the owner resides or elsewhere; and whether upon the employment of the master or of the owner, or of his agent—excepting in those cases where the lien has been clearly waived, or "notice has been given to the workmen and other material-men, in order that they may not be deceived."

The lien laws of the States, hitherto deemed necessary to obviate the consequences of the decision in the case of *The General Smith*, would seldom or never be resorted to, and the anomalous consequences of the adjudications with regard to them would disappear if it were established "that it is the ship, and not the ship of a particular owner, nor the ship of a particular flag, or national character; not a domestic ship, nor a foreign ship; not a ship in a port of a State to which she does not belong, or in which her owner does not reside, but a ship—every ship—that is bound for the bill of lading, the charter party, the wages of the seamen, repairs, supplies, materials, and maritime loans." 1 *Ben*. 141.

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## PULLAN v. KINSINGER.

*Circuit Court, Sixth Circuit ; Southern District of Ohio,  
1870.*

## COLLECTION OF TAXES.—INJUNCTION.

Section 19 of the Internal Revenue Act of July 13, 1866, 14 *Stat. at L.* 152, as amended March 2, 1867, *Id.* 475, — which provides that no suit to restrain the assessment or collection of any tax authorized, shall be maintained in any court,—applies to all cases where the officer has power to inquire and determine whether the thing assessed by him is liable to taxation, however erroneous his decision of that question may be.

The statute is not unconstitutional ; either as depriving the party of his property without due process of law, or as refusing trial by jury.

## Bill in equity for an injunction.

This action was commenced by Richard B. Pullan and others against Christian Kinsinger and others, to obtain an injunction restraining the defendants from proceeding with the collection of a tax, which, as internal revenue officers of the United States, they claimed to collect from the defendants, as distillers. The tax in question was claimed under section 20 of the act of July 20, 1868, 15 *Stat. at L.* 133.

The action was commenced in the superior court of Cincinnati, by which a restraining order was granted. The defendants then procured the removal of the cause to this court, and now demurred to the bill.

*Warner M. Bateman*, district-attorney, and *Mr. Stanberry*, in support of the demurrer.

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*H. L. Burnett*, and *Stanley Matthews*, in opposition.

EMMONS, J.—The complainants, as they were required to do by section 6 of the act of July 20, 1868, 15 *Stat. at L.* 126, gave notice that they would ferment seventy-two hours, and aver they actually employed all that time, but that the surveyors, in estimating the capacity of the distillery for purposes of taxation, unlawfully disregarded the period fixed in the notice, and assumed one of forty-eight hours only; that this resulted in their determining upon a false capacity, and provided for the assessor a fictitious basis of taxation. They aver that taxes have been paid in full upon all their actual production and all which can be produced while the period of seventy-two hours is employed. They claim, therefore, that the assessor, by taxing a theoretical production which they never have produced, has exceeded his jurisdiction, and the assessment being void, they are entitled to an injunction, notwithstanding the statute prohibiting its issue; that the inhibition does not apply when the proceedings are void.

The government claims the period mentioned in the notice is not obligatory upon the surveyors, but that it is their duty to fix upon the most profitable period of fermentation in order to ascertain the "true producing capacity" of the distillery, as directed by the statute; that when it is thus judicially ascertained and certified to the assessor, he must, as has been done, impose a tax of eighty per cent. of what might be produced had the distillery been run to its full capacity as declared by the survey. It further claims that the statute prohibiting an injunction applies; that both the surveyors and assessor had jurisdiction of the subject, and their proceedings are not nullities, although irregular and illegal.

In the circumstances of this contest it would be bene-

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ficial could the court express an opinion upon the construction of the statute, accompanied by such reasons as would render it influential. But the wide differences at the argument in relation to facts material to its right interpretation render this impossible. The demurrers, therefore, will be sustained upon the ground solely that neither this court nor the state tribunal from which these causes were removed, have any right to restrain the collection of a federal tax assessed by an officer having jurisdiction of the subject, be it never so irregular or erroneous.

This condition of opinion, formed from full recent investigations of this subject in reference to a different tax, when at the bar, was at the opening of the cause announced to counsel. The argument, of far more than ordinary ability, although instructive and interesting, has not, so far as this case is concerned, materially changed it.

The accident of a judge's confidence in his opinion has but little to do with the propriety of judicial discussion. The circumstances attending this litigation, the strong feeling on the part of the complainants, and the fact that a State tribunal of the highest respectability and influence has granted restraining orders, would render a brief, unreasoned judgment improper.

Although nearly all which will be said is familiar to the experienced lawyer, yet from the probability that its reproduction here will bring it before those classes more immediately the subjects of this and similar laws, I deem it a duty to do what otherwise I should say was wholly unnecessary. If the argument seems extended, it is conceded that collateral circumstances, and not the condition of the law, warrant it.

I regret, now that I conclude to refer to a few books to justify my judgment, that the learned counsel cited no decisions upon the first subject to be discussed. The complainant assumed that a clear violation of the stat-

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nte, resulting in an excessive assessment, rendered the proceeding void, and so not a tax within the meaning of the inhibitory statute. Counsel for the government assumed as fully the jurisdiction of the assessor, and treated the degree of illegality as immaterial. Since the argument, I have been continuously engrossed in other judicial duties, and have been able to command but few hours for the examination of books. I am compelled, therefore, in order to comply with the request for an early decision, to refer to those which the accidents of former briefs render accessible. They are not, perhaps, the most applicable, and such in all cases as a better opportunity would have selected. They do, however, illustrate the reasons upon which the decision rests, and are confidently referred to as in accord with a large and prevailing class of judgments to which they belong.

Section 19 of the act of July 13, 1866, as amended in 1867, provides " that no suit to restrain the assessment or collection of a tax shall be maintained in any court."

If a statute authorizes an officer to assess generally, excepting in plain terms certain persons and things, and the persons and things are nevertheless taxed in violation of law, has not the officer so exceeded his power as to render his judgment void? Can it, in any sense applicable here, be said that he has jurisdiction of the subject? Courts, in reference to the same facts, have answered this difficulty according to the purpose for which the question is asked. If it comes from an officer executing a warrant fair on its face, the reply upholds the process and protects him, although the law forbade its issue. In these cases it is said the general subject of taxation, and the judicial duty of determining, either upon view or inquiry or evidence, who and what are within the law, is imposed upon the assessor; and an erroneous decision does not for all purposes ren-

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der proceedings based upon it void, If an assessment made in the same circumstances is relied upon to divest a title through a tax sale it is declared to be invalid. Owing to the poverty of language, the same literal reason is given in both instances. The innocent officer is protected because the assessor has jurisdiction, and the title is void because he had none.

It is said a court of equity has not jurisdiction to decree damages, save as an incident ; yet, if a defendant does not demur or object at the first opportunity, the jurisdiction is conceded. Here the term means something wholly different from its sense when we affirm that the same court has no jurisdiction to try a citizen for murder, or dissolve a corporation upon *quo warranto*. And this is not peculiar to a court of equity. It is an axiom in this department of the law, that consent cannot confer jurisdiction, and yet, without stopping to call it an exception, numerous decisions say that even silence will waive jurisdictional objections. If the power of special tribunals is made to depend upon preliminary proofs, and on writ of error it appears they are wanting, it is said they are jurisdictional facts, and a reversal follows. In the same class, if the record does not affirmatively show the error, and defendant has appeared, or the record comes collaterally in question, it is said, as jurisdiction appears without them, their proof will be presumed. *Doughty v. Somerville R. R. Co.*, 1 *Zab.* 443 ; *Road in Moore Township*, 5 *Harr.* 116 ; *Wight v. Warner*, 1 *Doug. [Mich.]* 384 ; *Kennett's Petition*, 4 *Fost.* 141 ; *State v. Richmond*, 6 *Id.* 232 ; *Malone v. Clark*, 2 *Hill*, 657 ; *Embury v. Conner*, 3 *Comst.* 511 ; *Commonwealth v. Henry*, 7 *Cush.* 512 ; *L. M. R. W. Co. v. Perrin*, 16 *Ohio*, 479.

Numerous judgments fail to indicate the limitations with which they employ this general term. Its use in such manifold significations causes an appearance of

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conflict beyond what really exists. Confusion is created only when these broad generalities are quoted and sought to be enforced where they have no application.

These illustrations might be greatly multiplied ; they are entirely familiar, and have been noticed only as the more brief mode of answering several elementary books where abstractions are found, the literal application which would warrant the assumption of the complainant's counsel that an assessment in violation of law was a usurpation of jurisdiction.

Not only is this term employed in so many senses that its signification is always to be sought in the circumstances of its use, but no judge has been successful in embodying in a sentence a definition of jurisdiction, universally applicable, even to a single class of cases. It is always necessary to restrain the generality, or help out the too limited meaning of words. The definition has always to be defined. No such attempt will be made here. Indeed, the necessities of this case will carry us nowhere near the boundaries of the doctrines which uphold the doings of *quasi* judicial officers. Announcing a rule for the facts in these cases only, it is sufficient that a statute has authorized the assessor to entertain the general subject of taxation, that it was in fact entertained, and a judgment, lawful or unlawful, was rendered concerning it. So far as this judgment was concerned, whether lawful or unlawful, is deemed quite immaterial.

The following judgments show that similar inhibitions have been employed in all cases where the proceedings were not *void*, and also as pointedly that those in this case are not so :

In *Chegaray v. Jenkins*, 1 *Seld.* 381, a building, clearly exempt by law, was assessed, and the collector sued for seizing property. RUGGLES, Ch. J., says : "The assessor acting judicially in deciding whether

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the plaintiff's building was a dwelling, or exempt as a seminary of learning," and proceeds to show that, although not for all purposes conclusive, it was not void, and protected the officer. On page 382, it is said the remedy is under the provisions for appeal.

In *Van Rensselaer v. Cottrell*, 7 *Barb.* 129, HARRIS, J., says: "If the lands were in the town, that gave the assessors jurisdiction of the subject matter. In making the assessment they performed a judicial act, and no matter how much they erred in its performance, it cannot render their action void." The officer collecting the tax was protected. He cites 1 *Hill*, 130, 3 *Denio*, 117, and *Van Rensselaer v. Witbeck*, 7 *Barb.* 133. The thing assessed was not, in fact, subject to taxation.

The following judgment is peculiarly applicable to some of the positions taken in argument in this case: In *Van Rensselaer v. Witbeck*, 7 *Barb.* 133, a statute provided that if an affidavit was presented of an over-assessment, it, and not the valuation, should be the guide for taxation. In deciding that trespass would not lie, Judge HARRIS, p. 137, says: "The assessors were to ascertain who and what are to be taxed. This was within their jurisdiction, and as they act judicially, their decision cannot be questioned collaterally, though they proceed irregularly. Thus, if they should refuse to adopt the sum stated in the affidavit as required by the statute, it might furnish ground for reversing their decision, but would not render the assessment void." He remarks that the departures from the statutory requisites were gross and palpable.

In *People v. Albany Common Pleas*, 7 *Wend.* 485, a court martial issued a warrant to collect a fine where the defendant had not been summoned. It was insisted that the proceedings were void, and the statute prohibiting replevin did not apply. The court says: "If it appears by the warrant that the officer is authorized to

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collect any tax assessed, or fine, replevin is not the remedy to correct his mistakes or trespasses. The warrant authorized the officer to take the property of Hammond. Whether he had a right to take it cannot be inquired into in such an action. The legislature have forbidden it."

The intimation that the officer would be a transgressor in this case is probably inadvertent, as the same court, in *Savacool v. Boughton*, 5 *Wend.* 178, had on full consideration decided the contrary. There a judgment was rendered against the plaintiff, without summons, in a court not of record, and the officer who executed the final process was sued. It was held that although the proceedings were void as between justice and party, still, when the process was fair on its face, and gave no notice of the facts showing want of jurisdiction of the person, the officer was protected. The former cases in that court are reviewed. *Suydam v. Keys*, 13 *Johns.* 444, which held a tax collector liable for executing a warrant which described plaintiffs as residents, when in fact they were non-residents, and so not subject to tax, is dissented from. *Wise v. Withers*, hereafter noticed, 3 *Cranch*, 331, is also disapproved. *Beach v. Furman*, 9 *Johns.* 229, is approved. It is held that the assessment of a woman not liable to highway duty was not a void proceeding.

Statutory prohibitions in different circumstances, all applicable here, were enforced, although proceedings were in violation of law, in *Keyser v. Waterbury*, 7 *Barb.* 650 ; *Perry v. Richardson*, 9 *Gray*, 216 ; *Macklot v. Davenport*, 17 *Iowa*, 383. In *Holt v. Oldwine*, 7 *Watts*, 173, replevin was brought for property seized upon the warrant of a court martial. Plaintiff was not a member of the troop, and so not subject to duty. As there was power to judge in the class of offenses, although gross irregularities characterized the proceedings, and the plaintiff was not in fact subject to duty, it

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was said the action could not be maintained. The same argument made here was there urged. In *O'Reily v. Good*, 42 *Barb.* 521, property was seized upon a warrant issued by the United States assessor. It was claimed the law was unconstitutional, and replevin brought. The court set aside the writ on motion, saying that whether the New York statute prohibiting replevin applied to the case of a federal tax or not, it was unfit such an action should be maintained. It would defeat, if tolerated, the collection of the national revenues.

The position of the complainants is quite conceded, that if the proceedings are *nullities* the statute would have no application. Such are the decisions in the same State tribunals from which we have quoted. The two classes are by no means in conflict. See *Le Roy v. E. S. Railway*, 18 *Mich.* 233; *Stockwell v. Veitch*, 15 *Abb. Pr.* 412; *Mills v. Martin*, 19 *Johns.* 7; *Macklot v. Davenport*, 17 *Iowa*, 383. The concession of the rule contended for is made in most of the judgments when the statute is applied.

Nearly every State in the Union has similar laws, or has decided without them that the common law forbids such a process where property is in *custodia legis*. Numerous decisions applying, or refusing to apply them, have been made, all going upon the same principle. If there is general jurisdiction in the class of cases involved, and the tribunal has judicially determined that the case is within it, the irregularities, however gross, do not interfere with the application of these prohibitory laws.

The references thus far have been selected because they were applications of similar statutes. A few additional ones will be noticed upon the general position that the assessor, within the most limited sense of the rule, had in this case jurisdiction of the subject: *Telfourd v. Barney*, 1 *G. Green*, 581, well lays down the rule. The petition to sell land omitted a statutory

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requisite. The court, adopting what is said in several federal decisions, say : "They came into court and brought in the subject matter, and the court acted. It matters not that it should have been otherwise. Had it power to act at all ? Could it have sustained a demurrer to the petition, and given judgment for the defendants ? This gives jurisdiction of the case," &c.

Sheldon v. Newton, 3 *Ohio St.* 494, arose upon a sale of land by administrators. On pp. 498-9, the familiar definition of jurisdiction in *United States v. Arredondo*, 6 *Pet.* 709-12, and kindred cases, is adopted, and after explaining this definition by saying that in all cases this jurisdiction must be made to appear by showing that the law has intrusted the tribunal with the power to entertain the complaint, that such complaint was presented, and that under it the person or thing has been brought before it, the court say : "We wholly dissent from the position taken in argument that the jurisdiction of the court can be made to depend upon the record's disclosing such a state of facts as to warrant the exercise of such authority." *Voorhees v. Bank of the United States*, 10 *Pet.* 449 ; *Grignon v. Astor*, 2 *How.* 339 ; and the other cases in the federal courts, show that if the general power of judgment is given, and the court decides upon the sufficiency of the preliminary proof which is necessary rightfully to launch it, an error in this regard does not render its judgment void. It is decided in *Paine v. Morland*, 15 *Ohio St.* 435, that if the court acquired jurisdiction by issuing process on attachment, and seizes property, although it violated the statute and rendered judgment without publication, it was not void. It approves and applies the doctrines of *Voorhees v. Bank of the United States*, *ubi supra*. The court says decidedly the statute forbade the judgment without publication. For many purposes, *ex parte* statutory assessments and sales may be attacked where a similar proceeding after service of process by a

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court could not be. But the difference does not consist in the fact that one is void, and the other not. Where all is *ex parte* and summary, with no litigation or appeal, the statute must be complied with, in order to divest a title. It is a rule of protection applied in that class of cases only. But even in those, notwithstanding irregularities, an officer executing the process is not subjected to action. He is protected because there is jurisdiction of the general subject to which his warrant relates, and whether it emanates from a court or an assessor, the proceedings are not nullities if jurisdiction in this broadest sense exists.

The case of *Wise v. Withers*, 3 *Cranch*, 331, we are aware, sustains a different rule. In that a court martial invested with power to try offenders for neglect of militia duty, in due form convicted the plaintiff. The supreme court, holding that he was exempt under the statute, declared the judgment void for all purposes, and the innocent officer who executed the process liable in trespass. This case I do not find directly overruled in the supreme court, but a long series of judgments wholly at war with it have fully established in that court a different doctrine. It would not now hold any party, much less an officer, liable in trespass, when a court charged by law with the duty had judicially determined, upon full hearing, that a person or thing capable in its own nature of being such was the subject of assessment or fine. It has very frequently been dissented from by eminent judges and authors. It is somewhat singular that in *Dyer v. Horner*, 20 *How.* 65, its correct general definition is twice referred to, without any notice that its application by Chief Justice MARSHALL was diametrically opposed to the argument it is there quoted to illustrate. I feel warranted in assuming, notwithstanding *Wise v. Withers*, that the supreme court would not hold the collector in this case liable in trespass, even though the assessor directly

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violated the statutes, and assessed for a fictitious deficiency, when none in fact existed.

It is said, in answer to this, that the act of 1867 is unconstitutional ; that it denies due process of law, and substantially takes the citizen's property for public use without compensation ; that it unlawfully confers on others that judicial power which, under the constitution, can be confided to the courts alone.

In order that we may appreciate fully the inapplicability of this grave charge against a statute more kindly and liberal in its provisions, so far as the court's examinations have gone, than that of any State in the Union for similar purposes, let us see what is its utmost effect. How far does it change the common law ? By that law the citizen could not replevin property seized for the collection of a tax. It was deemed impolitic to suffer such a remedy, and the laws of the States, nearly all of which have enacted them, declaring the same thing, are but assertions of this principle. According to the English equity, an injunction would not go in any case at all analogous to that at bar. Wide as the departures are from these principles in some of the State courts, all disclaim the jurisdiction *per se*. By the rarity and exceptional character of their interposition they authorize the assertion of the general rule that there was no remedy by injunction to prevent the collection of an illegal tax. Irrespective of all legislation, there was neither replevin nor injunction. The wrong must be submitted to and suit at law brought to recover damages for its infliction.

In what, then, is the constitution or the general principles of good government violated ? In order to save the citizen the delay and expense of a suit to recover back the payment which he deems unlawful, a speedy and inexpensive appeal is given to the commissioner, who is directed to refund all moneys paid upon illegal assessment. If dissatisfied with his decision,

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the citizen may sue in the courts, which, up to that of last resort, are open. He may sue his government as freely as his neighbor, and when judgment is recovered, the national treasury is devoted to its payment. Neither judicial forms nor trial by jury is denied.

When it is added that provisions for appeal and review, far less generous and protective than these, have, in the State tribunals, without exception, been adjudged, upon common law grounds, to be exclusive, and that the statute prohibiting an injunction in this case was wholly unnecessary, enacted only as a politic and kindly publication of an old and familiar rule, it would seem as if nothing was left for doubt or discussion.

The argument has not, however, been put in this form for the purpose of resting it there. If we have misconceived the nature of these remedies never so much, there is still a broad margin in the constitutional power of the government ample to cover any possible difference.

A short history of this subject in the national tribunals will show there is nothing left for this court to discuss on principle. All its modifications are settled by express adjudication.

Originally, actions to recover back money exacted for duties illegally claimed to be due were sustained in the national courts. *Elliot v. Swartwout*, 10 *Pet.* 137; *Bend v. Hoyt*, 13 *Id.* 263; *Greely v. Burgess*, 18 *How.* 413, and other cases, so decide. The act of March 3, 1839, provided that all moneys should be immediately paid into the treasury, and authorized the secretary to refund all over-payments. There was no express inhibition of suits against the collector. But in *Cary v. Curtis*, 3 *How.* 236, it was held that its effect was to prevent them. In *Curtis v. Fielder*, 2 *Black*, 461, the general doctrines of *Cary v. Curtis* were re-affirmed. On page 479, it is said, under the act of 1839, importers

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were not without remedy. If it was shown more money was paid than was due, the secretary of the treasury was authorized to refund it. The constitutional principles which begat a disagreement in *Cary v. Curtis* were more intelligently discussed and settled in *Murray v. Hoboken Land, &c. Co.*, 18 *How.* 272. Under the act of 1820, authorizing the secretary of the treasury to issue a distress warrant against defaulting collectors, land had been sold. The proceeding was attacked as unconstitutional, because no hearing was given the defendant, and no trial by jury. It was said to be conferring judicial power upon other than the courts. The law, after the most full consideration, was held to be valid. It was shown that like proceedings had immemorially existed in England, and since magna charta. The distinction was between proceedings to collect public dues, and suits for enforcing private rights. Numerous instances of similar laws are cited from the several States having constitutional provisions like those quoted and relied on by the plaintiff in error.

The unreasonable extension of this doctrine is carefully limited as follows: "To avoid misconstruction upon so grave a subject, we think proper to state we do not consider that Congress can withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law or in equity or admiralty; nor, on the other hand, can bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters concerning public rights which may be presented in such a form that the judicial power is capable of acting on them, but which Congress may or not bring within the cognizance of the courts of the United States, as it may deem proper."

*Philadelphia v. The Collector*, 5 *Wall.* 730, was an action to recover back money paid for taxes. It is said

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that, but for the authority to sue, given in the statutes, the remedy would have been confined to an appeal to the commissioner. Justice CLIFFORD says: "The direction of the statute is, without exception, that all judgments shall be paid by the commissioner with costs and expenses of suit. Parties compelled to pay an illegal assessment ought to have a convenient remedy to redress the injury; and inasmuch as it is enacted by Congress that no suit shall be maintained in any court to restrain the assessment or collection of taxes, it is believed there is no more appropriate or effectual remedy known to the common law than the action of assumpsit for money had and received as in this case." In *Nichols v. United States*, 7 *Wall.* 122, the plaintiff having paid money conceded not to be due, but having omitted to protest, as provided by the statute, in order to maintain a suit at law, he brought his action in the court of claims. In deciding that there was no liability on the part of the government, and that the claimant was wholly remediless (pp. 126 and 127), after referring to the rule that the government cannot be sued unless a suit is in some form authorized by statute, it says that in this instance, allowing suit at all, even after protest, was "a matter of beneficence; as it confided to the secretary in the first instance to decide upon the amount of duties, so it might have made him final arbiter in all his disputes concerning them." The decision is full that in this class of cases it is competent to confine the remedy for wrong to the adjudication of the government officers. On pp. 130 and 131, it is said, "If a party complaining of an illegal assessment does not appeal to the court, he is also barred of all right to sue; and he is also barred unless he does so within twelve months. Can it be supposed that after Congress has carefully constructed a revenue system, with ample provisions to redress wrongs, that it intended to give the tax-payer and importer a further

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and different remedy?" It is added that the mischief which would result, forbids the idea that any other than the prescribed modes are open for the redress of wrongs.

These judgments leave nothing to decide here. The power for this legislation is asserted, and its policy amply vindicated.

The same motive which has induced this seemingly unnecessary argument thus far, prompts the pursuit a little further of the suggestion that these principles are not peculiar to the federal government and courts. They have been applied in every State where questions have been raised by the citizen in reference to any governmental right.

That special remedies by appeal and review, for the correction of erroneous taxation, are always held to be exclusive, and cut off by implication all actions at law and in equity, see *Little v. Greenleaf*, 7 *Mass.* 239; *How v. Boston Co.*, 7 *Cush.* 273; *Water Power v. Boston*, 9 *Metc.* 199; 13 *Id.* 380; *Kimball v. Whitewater Co.*, 1 *Cart.* 285; 2 *Seld.* 258; 1 *Id.* 382. Similar judgments are very numerous. They apply the rule in equity as well as at law. In *Hughes v. Kline*, 30 *Pa. St.* 227, a bill was filed to be released from over-taxation, and dismissed upon the ground that the statute had given a remedy by appeal. *Macklot v. Davenport*, 17 *Iowa*, 384, was like it. The bill was dismissed because a special remedy was given, and the cases at law cited and their rule applied. *Dean v. Todd*, 20 *Mo.* 92, dismissed a bill for like reasons. There was in neither of these, nor the many other similar judgments, any express prohibition, as has been unnecessarily made by Congress in this case.

It has been again and again decided, under every variety of State constitution intended to secure "trial by jury," "due process of law," and "the inviolability of private property," that the political power may ap-

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propriate it by any summary mode which the wisdom of the legislature may prescribe, and that neither the novelty nor the injustice of the form will warrant judicial interference. The following are but a small portion of the numerous judgments establishing the principle, and illustrating the tendency in our country to question and demand the reiteration of the oldest and best settled governmental powers :

In Ohio this has often been ruled : *Mercer v. Williams*, *Wright*, 132 ; *Bates v. Cooper*, 5 *Ham.* 115 ; *Williard v. Hamilton*, 6 *Ohio*, 454 ; *Symons v. Cincinnati*, 14 *Id.* ; 12 *Ohio St.* 105. It is repeatedly said in that State, that these constitutional provisions have no influence upon the power of the State to prescribe rules by which to condemn or tax the citizen's property. So also, *Rubotham v. McClure*, 4 *Blackf. (Ind.)* 505 ; *Hawkins v. Lawrence*, 8 *Id.* 266 ; *McCormic v. Trustees*, 1 *Cart.* 48 ; *Canal Co. v. Ferris*, 2 *Id.* 331 ; *Bloodgood v. Mohawk Co.*, 18 *Wend.* 9 ; *Baker v. Johnson*, 2 *Hill*, 342 ; *People v. Hayden*, 6 *Id.* 359 ; *People v. Commissioners*, 5 *Denio*, 401 ; *Rexford v. Knight*, 15 *Barb.* 627 ; *Swan v. Williams*, 1 *Gibbs (Mich.)* 442 ; *Mason v. Kennebec Co.*, 31 *Me.* 215 ; *Ligat v. Commonwealth*, 19 *Pa. St.* 456 ; *Yost's Report*, 17 *Id.* 524 ; *People v. Wells*, 12 *Ill.* 102 ; *Bradley v. New York, &c. R. R. Co.*, 21 *Conn.* 304 ; *Clark v. Saybrook*, *Id.* 313 ; *Mayor v. Scott*, 1 *Pa. St.* 309 ; *Jackson v. Winn*, *Litt. (Ky.)* 322 ; *Gashweller v. McIlvoy*, 1 *A. K. Marsh.* 84 ; *Raleigh Co. v. Davis*, 2 *Dev. & B.* 451 ; *Railroad Co. v. Middlesex*, 7 *Metc.* 78 ; *People v. M. S. R. R. Co.*, 3 *Mich.* 496 ; *Smith v. McAdam*, *Id.* 506 ; *Mt. Washington R. R. Co's Petition*, 35 *N. H.* 135.

If more plenary forms are accorded by the judicial tribunals, these and a far greater number of like determinations decide that it is only because local and exceptional statutory or constitutional provisions ex-

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pressly secure them. In no instance have these old and familiar clauses been held to secure such results.

Michigan, Vermont, New York, and other States, have laws providing that if property is seized by the collector, in the possession of a delinquent tax-payer, the true owner shall have no remedy for it against the officer or the government. He must look solely to the person for whose tax it was taken. In others it is provided by law, or ruled upon principle, that if judgment be rendered against a city or town, any citizen's property may be seized, and he be remitted for reimbursement to a suit against the municipality. One of these laws was attacked in *Sears v. Cottrell*, 5 *Mich.* 251. It was claimed that to subject the property of one man to seizure for the tax of another, for no other reason than because it might accidentally be in his possession, was in violation of the causes securing "trial by jury" and "due process of law." The able opinion of Justice CHRISTIANCY is one of the most interesting and instructive to be found on this subject. The distinction is drawn between private litigations and those proceedings in which the political power enforces its claims. Its full history and able argument are full to show, that in practice these constitutional provisions never have been, and that public policy forbids they ever should be applied in the assessment and collection of the public revenue. In *Sheldon v. Vanbuskirk*, 2 *Comst.* 478, a similar statute of New York is referred to in illustration of this general principle.

The whole field of the police power is fertile with pertinent illustrations of the utter inapplicability of these constitutional generalities, when the public asserts a right. In *People v. Hawley*, 3 *Mich.* 330, the defendant owned extensive breweries, which were rendered worthless in a day, by an enactment making his lawful business a crime; and other cases in that and other States upon similar statutes, and those in refer-

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ence to destroying property in cases of conflagration and pestilence, and the promotion by taxation of public improvements which, by indirect injuries, practically destroy one man's business and give it to another; are familiar instances in which these general provisions have been invoked again and again, only to have it repeated that they are of no significance, when in any form this political right is exercised. See 18 *Wend.* 127; 2 *Denio*, 461.

A strong illustration of how firmly judicial opinion is fixed in favor of maintaining to its full extent this necessary public power, is found in the stringent construction in favor of the government, and against the citizen, which has been always given to the clauses in our national and State constitutions, providing that property shall not be taken for public use without compensation. It may be injured indefinitely, and under this clause it has been held no compensation is due. A private agreement would not be thus interpreted. See *Sedgwick on Cons. Law*, 524.

*Cooley on Constitutional Limitations* was cited to show that the governmental interpretation of the statute might carry even the taxing power beyond its limit. It is not supposed much reliance was placed upon this; and it would not be noticed, did not the decisions in reference to the absolute immunity of the legislature from all judicial control in the whole matter of taxation furnish another numerous list of examples, showing that these constitutional protections do not control the exercise of power on the part of the government. *McCulloch v. Maryland*, 4 *Wheat.* 316; *People v. New York*, 2 *Black.* 620; 2 *Wall.* 200; 3 *Id.* 573, and many other federal judgments, assert the right of taxation, even to the limit of destroying the business or prohibiting indirectly the thing assessed. *Fifield v. Close*, 16 *Mich.* 505; *People v. Mayor*, 4 *N. Y.* 425, 426, 427; *Scovil v. Cleveland*, 1 *Ohio St. N. S.* 126; *Maloy v. Marietta*, 11

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*Ohio St.* 638 ; *Reaves v. The Treasurer*, 8 *Id.* 333 ; *Armington v. Barnett*, 15 *Vt.* 749 ; *Weister v. Hade*, 52 *Pa. St.* 478, are but a small portion of the State decisions, which assert in reference to their legislatures this unlimited and wholly irresponsible power of taxation. The courts have no possible control over it. No matter how unjust or severe upon particular interests and persons, unless the imposition is at war with some special constitutional clause in reference to the subject, the provisions relied on in this case have never been held to authorize the interference of courts. *Sedgwick on Cons. Law*, 502, 509 ; and 7 *Cush.* 53, 82.

Whenever the government seeks the property of the citizen, exercising the right of eminent domain, or by taxation in any of its numerous forms, the processes for seizure and assessment are, in the most plenary sense, within the discretion of the legislatures. It has been often said that the only correction for what is harsh and unjust is to be sought in the nature of our institutions. Those who study this history are not advocates for decreasing a power, without which no people ever have been continuously protected and prosperous.

The bill must be dismissed.

Decree accordingly.

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United States v. Thomas.

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## UNITED STATES v. THOMAS.

*District Court; Northern District of New York, November T., 1870.*

## SMUGGLING.—REQUISITES OF INDICTMENT.

Merely importing goods subject to duty without having paid or secured the duties, is not, in general, an offense. To constitute smuggling, for which an indictment may be sustained, there must be something in the manner of the importation which violates a statute defining the offense; such as secrecy or concealment, an intent to defraud the revenue, or the like.

An indictment for the offense of smuggling must allege the facts relied upon as rendering the importation alleged an offense, or state the particular illegality intended to be proved; and such allegation must be proved as laid.

## Motion in arrest of judgment.

HALL, J.—The defendant was tried at the present term, and a verdict of guilty was rendered upon one count of the indictment against him. He thereupon moved an arrest of judgment on account of the alleged insufficiency of the count on which he was indicted. This count charged "that the said David H. Thomas, now or late of Niagara, in the county of Niagara, in the State of New York, heretofore, to wit, on the first day of September in the year of our Lord one thousand eight hundred and sixty-nine, at Niagara, in the county of Niagara, and State of New York, in said district, and within the jurisdiction of this court, did fraudulently, knowingly, and unlawfully receive and conceal certain goods, wares, and merchandise, to wit, five hundred pounds of nutmegs, after their importation into the United States contrary to law, knowing the

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same to have been imported contrary to law, in this, that the said goods, wares, and merchandise, so imported as aforesaid, were, at the time the same were so imported into the United States, subject to duty by law, the duties due and payable upon said goods, wares, and merchandise, not having been paid or accounted for, he, the said David H. Thomas, at the time he so received and concealed the said goods, wares, and merchandise, as aforesaid, well knowing that the duty due and payable upon said goods, wares, and merchandise, had not been paid or accounted for, contrary to the statute of the United States of America in such case made and provided, and against the peace of the United States and their dignity."

The count was intended to be based upon the 4th section of "An Act further to prevent smuggling and for other purposes," approved July 18, 1866, 14 *Stat. at L.* 179, which provides "that if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any goods, wares, or merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such goods, wares, or merchandise after their importation, knowing the same to have been imported contrary to law, such goods, wares, and merchandise shall be forfeited, and he or she shall, on conviction thereof before any court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both, at the discretion of such court; and in all cases where the possession of such goods shall be shown to be in the defendant, or where the defendant shall be shown to have had possession thereof, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

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It will be seen that the indictment in express terms limits the allegation that the nutmegs mentioned in the indictment were imported and brought into the United States contrary to law, by stating that the same, being subject to duty by law, were so imported and brought into the United States, without the duties due and payable thereon having been paid or accounted for; at least that is the substance of what it was intended to allege by the inartificial language used in the indictment.

This makes it necessary to consider what is the true construction of the fourth section of the act of 1866, above recited, and whether the allegation made brings the case stated within its provisions.

As a general rule it may be said that it is not contrary to law to import or bring into the United States goods subject to duty without having paid or accounted for such duties. In almost every case of importation the goods are not only brought into the United States, but are imported, in the true legal sense of that term as used in the revenue acts, before there is any obligation to account for or make payment of the duties. They are brought into the United States as soon as they are brought into its territory; and the act of their importation is complete when they are voluntarily brought into a port of delivery with intent to unlade them there (*United States v. Lindsay*, 1 *Gall.* 365; and if the goods are subsequently entered, and the other provisions of the law afterwards complied with, and the duties paid, no penalty or forfeiture is incurred.

Indeed, it is believed that there is no case in which a penalty or forfeiture is incurred, or can be enforced, or any crime or offense committed, simply because the duties on imported goods are not paid or accounted for before the importation was complete. It is by acts or omissions subsequent to the importation, that forfeitures and penalties are incurred, or crimes or offenses com-

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mitted, unless there is some law expressly declaring the importation itself, or the manner of making it, unlawful. Section 19 of the act of August 30, 1842, which provides for the punishment of any person who "shall knowingly, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States any goods, wares, or merchandise subject to duty by law, and which should have been invoiced, without paying or accounting for the duty," makes the clandestine introduction or smuggling into the United States of dutiable goods, in cases therein provided for, a criminal offense, which is complete as soon as the goods are so clandestinely introduced or smuggled into the United States; but in such cases it is the secret and clandestine manner of the importation, with the intent to defraud the revenue, and not the non-payment of or accounting for the duties prior to the importation, which constitutes the gist of the offense.

There are many cases to which this fourth section of the act of 1866 was probably intended to apply, and to which it may be properly applied; but it is unnecessary to refer to more than two or three acts of Congress to show what was probably the general intention of the national legislature in adopting the section under consideration. By section 5 of the act of July 10, 1861, 12 *Stat. at L.* 257, the President was authorized, under the circumstances therein set forth, to declare the inhabitants of a State, or any section or part thereof, to be in a state of insurrection against the United States; and by the same section it was provided that thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States should cease and be unlawful so long as such condition of hostility should continue; and all goods and chattels, wares, and merchandise, coming from said State or section into the other parts

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of the United States, and all proceeding to such State or section by land or water, should, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States. Section 4 of the same act (page 256), authorized the President to close ports of entry in certain cases, and give notice thereof by proclamation; and declared that thereupon all right of importation and other privileges incident to ports of entry should cease and be discontinued at such ports so closed, until opened by the order of the President; and that if, while said ports were so closed, any ship or vessel from beyond the United States, or having on board any articles subject to duties, should enter or attempt to enter any such port, the same, together with its tackle, apparel, furniture, and cargo, should be forfeited to the United States.

By some of the revenue acts it is made unlawful to import certain articles except in the form or condition particularly described. Thus, by section 1 of the act of July 28, 1866, 14 *Stat. at L.* 328, it is provided that no cigars shall be imported unless the same are packed in boxes of not more than five hundred cigars in each box; and that brandy and other spirituous liquors may be imported in casks or other packages of any capacity not less than thirty gallons; and that wine in bottles may be imported in boxes containing not less than one dozen bottles of not more than one quart each; and that wine, brandy, or other spirituous liquors imported into the United States, and shipped after October 1, 1866, in any less quantity than therein provided for, shall be forfeited to the United States. And see, for similar provisions in respect to the importation of beer, ale, and porter, and refined, lump, and loaf sugar, section 103 of the act of March 2, 1789. It is to such and similar importations contrary to law, and to the importation of articles the importation of which is en-

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tirely prohibited, that section 4 of the act of 1866 was intended to apply ; and, as applied to such cases, the rule of evidence, a presumption of guilt, declared in that section, may well be justified ; while it would be very harsh and oppressive if the provisions of the section in which it is found were to be applied to every case in which goods were actually imported or brought into the United States before the duties were paid or accounted for,—that is, to ninety-nine cases out of every hundred of honest importations.

Perhaps it might have been suggested, if the question had been at all argued on the part of the United States, that the indictment states that the nutmegs therein mentioned were imported contrary to law, and that so much of the indictment as states in what the illegality of the importation consisted, may be rejected as surplusage. But the short answer to that is, that this is a part of the description of the offense, and cannot be rejected as surplusage, even if the indictment would have been good if the particular illegality of the importation had not been set forth ; for if an indictment set out the offense with greater particularity than is required, the proof must correspond with the averments, and nothing descriptive of the offense can be rejected as surplusage. *United States v. Brown*, 3 *McLean*, 233 ; *United States v. Howard*, 3 *Sumn.* 15 ; *United States v. Foye*, 1 *Curt.* 364. But it is believed that the indictment would been bad, if the allegations of illegality of the importation had been simply that it was contrary to law, without showing the facts constituting such illegality, or stating the particular illegality intended to be proved.

Upon the whole case, it is very clear that the count on which the defendant was convicted is not sufficient to sustain a conviction ; and the motion in arrest of judgment is therefore granted.

Order accordingly.

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McKay v. Campbell.

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## McKAY v. CAMPBELL.

*District Court, District of Oregon; July T., 1870.*

## PLEADING.—ACTION FOR REFUSING A LAWFUL VOTE.

Where the plaintiff, in an action under the act of May 31, 1870, 16 *Stat. at L.* 140, for damages for preventing him from voting, alleges in the same count or cause of action that defendant prevented plaintiff from voting for several different officers, and that he refused his vote, refused to swear him as to his qualifications, &c.; his pleading is bad for duplicity, upon special demurrer or motion to strike out. These different acts are distinct causes of action, under the statute, and should be alleged in separate counts or statements.

But as the objection could only be taken, at common law, by special demurrer, it must be taken, under a reformed code which substitutes a motion to strike out for the special demurrer,—such as the *Oreg. Code of Pro.* § 103,—by such motion, and not by demurrer.

In order to sustain an action, under the statute, for refusing to swear the plaintiff in order to enable him to prove his qualifications as an elector, as prescribed by the State law, the evidence upon the trial must show that the reason for the defendant's alleged refusal was on account of the race, color, or previous condition of servitude of the plaintiff. Hence, this fact must be alleged in the complaint.

## Demurrer to a complaint.

DEADY, J.—This action was commenced July 1, 1870, to recover a penalty of five hundred dollars, under and in pursuance of section 2 of "An Act to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes," approved May 31, 1870.

Among other things it is alleged in the complaint that on June 6, 1870, as provided by law, a general election was held in the State of Oregon, and county of

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Wasco therein, at which a representative in Congress and also State and county officers were voted for and elected, and that on said day and long prior thereto the plaintiff was a citizen of the United States, and a resident of East Dalles, in said county and State, and legally entitled to vote at such election in the precinct aforesaid for all such offices. That on said day defendant was acting as judge of election in said precinct, in conjunction with George Corum and Thomas M. Ward, and as such judge was required by law to receive votes from the electors, and perform such other duties as were required by law of such officer; and that on said day the plaintiff appeared at the polls in said precinct and offered his vote for Joseph G. Wilson, as a representative in Congress, and for Joel Palmer for governor of Oregon, and others for different State officers, and for John Darrah for sheriff of said county, and for others for the different county offices; and that "the defendant combining with the other said judges, unlawfully and wrongfully prevented him from voting; that defendant confederating with said Ward and Corum unlawfully and willfully refused his vote; refused to swear him to his qualification as an elector; refused to enter his name on the poll books of said precinct; and refused to enter on record in said book his vote for the different candidates for whom he proffered to vote. All of which duties, though required of him by the laws of Oregon, he, the defendant, wrongfully and willfully failed and refused to do, though requested to do so by plaintiff; that defendant with said Ward and Corum ordered him away from said polls, and deprived him of his right as a citizen to vote, to his damage. By reason of which unlawful acts of said defendant, so acting and combining with said others, plaintiff has suffered damages; and he, defendant, forfeited and became liable as provided by law to pay said plaintiff therefor the sum of five hundred dollars, for which

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sum, with costs and allowances as provided by law, plaintiff now asks judgment of the court."

On July 8, the defendant demurred to the complaint, and for cause of demurrer alleged :

I. That it did not state facts sufficient to constitute a cause of action.

II. That several causes of action have been improperly united therein.

On August 2 and 3, the demurrer was argued by Mr. Kelly, of counsel for the defendant, and by Messrs. Mitchell and Cartwright, of counsel for the plaintiff.

Duplicity in pleading, or the statement of more than one sufficient matter as a ground of action or defense thereto in the same count or plea, is forbidden by the common law and the Code, as tending to useless prolixity and confusion. 1 *Chitty Pl.* 259 ; *Gould Pl.* 220 ; *Code*, 157, 161, 163. Duplicity in pleading, being, however, only an error in form, at common law the objection had to be made by special demurrer. *Chitty Pl.* 701 ; *Gould Pl.* 466. The Code having practically abolished special demurrers, except in the instances enumerated in title VIII. of ch. I., has substituted the motion to strike out for the special demurrer in the case of duplicity in pleading. It provides, section 103 :—

"When any pleading contains more than one cause of action or defense, if the same be not pleaded separately, such pleading may on motion of the adverse party be stricken out of the case."

For these reasons, I conclude that as to the second ground stated, this demurrer is not well taken, and that the objection should have been made by a motion to strike out the complaint.

As this demurrer must be sustained upon the ground that the complaint does not state facts sufficient to constitute a cause of action, it may be well enough to briefly consider the question of duplicity in the com-

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plaint, so that the plaintiff, if he desires to amend, may frame his amended complaint accordingly.

The complaint contains but one count or statement of a cause of action, and it is alleged therein that the defendant, in conjunction with the other judges of election, unlawfully and wrongfully prevented the plaintiff from voting for representative in Congress *and* for governor of the State of Oregon, *and* for sheriff of the county, *and* for other "county offices."

Now, if it was unlawful to prevent the plaintiff from voting for any one of the candidates for these several offices, that, it appears to me, is a separate and distinct cause of action, and should have been separately stated. But the complaint alleges not only that the defendant prevented the plaintiff from voting for a certain candidate for each of these offices, but that the defendant unlawfully and willfully *refused* his vote; *refused* to swear him as to his qualifications as an elector; *refused* to enter his name on the poll books; *refused* to enter his vote, &c. Here are four different acts, in addition to the first one stated, alleged to have been committed by the defendant, each of which are assumed by the pleader to be a distinct violation of the act of Congress, and consequently a separate cause of action. If so, they should have been stated or pleaded separately, so as to avoid the prolixity and confusion necessarily resulting from jumbling them together in one count or statement.

It is a question whether some of these alleged refusals are sufficient to support an action for the penalty given by the act. It does not appear that the penalty given by section 2 of the act, is given for *preventing* a person from voting or for refusing to *receive* or *record* a vote, but for refusing or knowingly omitting to give full effect to such section. Now, this section substantially provides, that if the law of the State requires any act to be done as a prerequisite or qualification for voting,

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and by such law officers are charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite or to become qualified to vote, it shall be the duty of such officers to give to all citizens of the United States an *equal* opportunity to perform such prerequisite, and become qualified to vote, *without distinction of race, color, or previous condition of servitude.*

What amounts to a refusal or willful omission to give effect to this section upon the part of the State officers, depends upon the duties imposed upon these officers in this respect by the law of the State. Upon examination it does not appear that the section commands these officers to admit or permit citizens of the United States "to *vote* without distinction of race, color, or previous condition of servitude," but only to give such citizens an equal opportunity to become qualified according to the law of the State, and to perform any act which the law of the State may require as a prerequisite—a condition precedent—to voting. The duty which this section enjoins upon the officers is something or anything which the State law requires the officer to do, so as to enable the citizen to qualify himself to vote, and from the nature of things, it must precede in point of time and order the *act* of voting, or anything subsequent thereto. If these suggestions be sound, then none of the acts complained of by the complaint are within the purview of the section, except the refusal to swear the plaintiff to his qualifications as an elector.

The law of this State provides, *Code*, 700 :

"Sec. 13. If any person offering to vote shall be challenged as unqualified by any judge or clerk of the election, or by any other person entitled to vote at the same poll, the judges shall declare to the person so challenged, the qualifications of an elector; if such person shall then state himself duly qualified, and the challenge shall not be withdrawn, one of the judges

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shall then tender to him the following oath: You do solemnly swear, &c. (to the effect that the affiant had all the qualifications necessary to authorize him to vote at the poll). And if any person so challenged shall refuse to take such oath so tendered, his vote shall be rejected.

"Sec. 14. If any person so offering such vote shall take such oath, *his vote shall be received*, unless it shall be proven by evidence satisfactory to the majority of the judges that he does not possess the qualifications of an elector, in which case a majority of such judges are authorized to reject such vote."

It seems to me that whenever a person offering to vote is challenged, that it then becomes necessary that he should take this qualifying oath before he can be said to be qualified to vote. By the interposition of the challenge, it becomes incumbent upon him to perform this prerequisite, to entitle himself to vote. But he cannot take this oath and perform this prerequisite without the judge shall furnish him an opportunity so to do. Therefore the law of the State makes it a duty of the judges, or one of them, to tender and administer the oath to him. Then comes the law of Congress and makes it the duty of the judges to give all citizens, "without distinction of race, color, or previous condition of servitude," the same and equal opportunities to perform this prerequisite—to take this oath—and thereby became qualified to vote. It follows, that a refusal or omission to furnish the equal opportunity to any person seeking to vote, on account of either race, color, or previous condition of servitude, is a violation of the act.

As to the first ground of the demurrer, I think it well taken. The complainant does not state facts sufficient to constitute a cause of action.

The act of Congress upon which this action is

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brought, provides for enforcing the amendment to the Constitution which declares :

“Art. 15. Sec. 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color, or previous condition of servitude.”

“Sec. 2. Congress shall have power to enforce this article by appropriate legislation.”

The act also regulates the elections of representatives in pursuance of section 4 of article 1 of the Constitution, which declares :

“The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof ; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators.”

Sections 2, 3, and 4 of the act, which relate to the enforcement of the amendment to the constitution, give penalties, to be recovered by civil action, against persons who violate them, but violations of that portion of the act regulating the election of representatives in Congress, are only punishable by indictment or information.

In considering the sufficiency of the complaint, therefore, in this action, no special significance can be given to the fact that the plaintiff offered to vote for a candidate for representative in Congress.

By the XIVth amendment to the Constitution, it is declared that:—“Art. XIV. Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside.” . . . . This clause of this amendment declares who are citizens of the United States, and of the several States respectively. The XVth amendment, above quoted, declares in effect that citizens of the United States and of the several States shall vote in their respective States at all elections by

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the people, without distinction on account of race, color, or previous condition of servitude. But the amendment does not take away the power of the several States to deny the right of citizens of the United States to vote on any other account than those mentioned therein. For instance, notwithstanding the amendment, any State may deny the right of suffrage to citizens of the United States on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, &c. The power of Congress in the premises is limited to the scope and object of the amendment. It can only legislate to enforce the amendment, that is, to secure the right to citizens of the United States to vote in the several States where they reside, without distinction of race, color, or previous condition of servitude. And this appears to be the intention of the act, so far as it relates to the enforcement of the amendment.

Section 1 declares, in effect, that all citizens of the United States, being otherwise qualified by law, shall be allowed to vote at all elections by the people in any State, district, &c., without distinction of race, color, or previous condition of servitude.

True, the language of sections 4 and 5, particularly the former, if taken literally, would apply to acts and proceedings intended to prevent citizens of the United States from voting, whether the same were done or carried on on account of the race, color, or previous condition of servitude of the citizens in question or not. But they ought to be construed so as to harmonize with the unambiguous sections which precede them, and must, in any view of the matter, be construed so as to have effect only within the limits of the power conferred by the amendment on Congress over the subject.

Upon this construction of the act, to maintain this action I think it would be necessary to prove on the trial :—

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I. That the plaintiff was a citizen of the United States, and otherwise qualified to vote at the time and place mentioned in the complaint.

II. That the defendant refused or knowingly omitted to furnish the plaintiff an opportunity to become qualified to vote, as by refusing or knowingly omitting to swear the plaintiff to his qualifications as an elector, when the law of the State made it his duty so to do, and that such refusal or omission was on account of the race, color, or previous condition of servitude of the plaintiff.

If it be necessary to prove these facts to maintain this action, they ought to be alleged in the complaint. Now the complaint is silent as to the reason of the defendant's refusal or omission to swear the plaintiff as to his qualifications as an elector. It may have been for some other reason than on account of his race, color, or previous condition of servitude, and then the plaintiff's remedy, if any, would be found under the State law and in the State tribunals. I know it may be said with much probability, that disingenuous judges of election who are violently adverse to and prejudiced against the amendment and the act, may refuse or omit to allow a citizen to qualify himself to vote, ostensibly for some reason not within the purview of the act, but really and in fact on account of his race, color, or previous condition of servitude. But this is a question of fact, and if the evidence is sufficient, the jury will be bound to disregard the pretenses of the defendant, and find according to what appears to have been the fact. Besides, to prevent a failure of justice on this account, it may be necessary and proper to hold, in this class of cases as in many others, that slight proof on the part of the plaintiff as to the reason of the defendant's refusal or omission, is sufficient to throw the burden of proof in this respect upon the latter.

The demurrer must be sustained.

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## UNITED STATES v. THE ATHENS ARMORY.

*District Court; Northern District of Georgia, March  
T., 1868.*

## STATUTORY CONSTRUCTION.—CONFISCATION.

Even in determining the construction of a statute authorizing a confiscation of property for an offense by its owner, words are not to be confined to a strict technical sense, when so doing will clearly defeat the evident intent of the statute.

Thus, the employment of the phrase "prize and capture," in the act of August 6, 1861, 12 *Stat. at L.* 319,—declaring private property used in promoting insurrection to be "lawful subject of prize and capture,"—does not limit the operation of the act to property taken at sea. Property found on shore, or even land itself, may be condemned under the act.

In prosecuting an information to enforce a seizure, under the act of August 6, 1861, issues of fact should be submitted for trial by a jury, according to the course of the common law. The act does not contemplate the determination of the facts by the judge, as in causes of admiralty jurisdiction.

An unqualified pardon, granted to the owner prior to the seizure of property, or the institution of any proceedings to condemn it, under the acts authorizing confiscation of property used to promote the rebellion of 1861-'65, is a bar to a judgment of condemnation.

## Trial of an information.

At March term, 1867, of this court, the district-attorney, in behalf of the United States, filed an information against certain property, real and personal, particularly described in the pleadings, and consisting of a tract of land near Athens, Georgia, with the buildings and improvements thereon, together with a great variety of articles, chiefly machinery, implements, and material for the fabrication of arms, some of the material

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being unwrought, and some of it advanced more or less towards completion as weapons of war. The property, of every kind, was of the value of one hundred and fifty thousand dollars; and it came to the custody of the marshal under a warrant of seizure issued on November 22, 1866, by the district-attorney.

The information treated the property as having belonged, prior to the occurrence of the alleged causes of forfeiture, to Ferdinand W. C. Cook and Francis L. Cook, copartners, using the name of Cook Brothers, and prays, on three grounds, for its condemnation under an act of Congress approved August 6, 1861, and, on an additional ground, for its condemnation under an act approved July 17, 1862. The provisions of these acts were, in part, recited; and it was averred that the proclamations of the president therein contemplated were issued and published.

The grounds of forfeiture alleged under the act of August 6, 1861, were the following:

1. That after the passage of said act, and after the publication of the president's proclamation in pursuance thereof, and during the late rebellion, Cook Brothers, for one hundred and fifty thousand dollars, sold and conveyed the property to the so-called government of the Confederate States, knowingly, with intent that the same should be used and employed in aiding, abetting, and promoting the rebellion.

2. That Cook Brothers, having on April 1, 1862, entered into a contract with the so-called Confederate States for the manufacture of thirty thousand rifles, did, on July 14, thereafter, to secure the sum of one hundred and fifty thousand dollars, paid in advance on said contract, make a deed of trust or mortgage to the said so-called Confederate States, covering the property now libeled; that the said Cook Brothers used and employed said property in aiding the rebellion, and especially in manufacturing said rifles, and

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that said deed of trust or mortgage was executed by them, knowingly, with intent to aid the rebellion, or to suffer the property to be used by others in aiding it.

3. That during the rebellion, and after the act of Congress and the president's proclamation, as aforesaid, the property was mortgaged by Cook Brothers to the so-called Confederate States, knowingly, with intent to employ the same, or suffer it to be employed, in aiding the rebellion; and that the said so-called Confederate States, in consideration of such mortgage, paid them one hundred and fifty thousand dollars, which they received with intent that it, too, should be used in aiding the rebellion, or by persons engaged in the rebellion.

The ground of forfeiture alleged under the act of July 17, 1862, was as follows :

4. That Cook Brothers did not, within sixty days after the publication of the president's proclamation conveying the warning provided for by said act, cease to aid, countenance, and abet the rebellion, and return to their allegiance to the United States, but that they contracted to manufacture, and did manufacture upon the land and with the machinery and implements described in this information, a large number of rifles for the so-called Confederate States, receiving, to that end and for that purpose, certain advances and sums of money, and did sell and deliver said rifles to the so-called Confederate States in accordance with the contracts, mortgages, deeds of trust, and conveyances before mentioned, "with the intent and purpose aforesaid."

After the filing of the information, Francis L. Cook, as survivor of Cook Brothers, his copartner, Ferdinand W. C. Cook, having departed this life on December 11, 1864, appeared and interposed a claim to said property, asserting thereby his right to the same. He answered both the information itself and sundry special inter-

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rogatories propounded to him by the district-attorney. From these answers, which were uncontradicted, it appeared that Cook Brothers were workers in iron, and from the year 1854 to April, 1862, had their establishment in New Orleans, La. It was there that, on April 1, 1862, they entered into the contract set forth in the information, with the so-called Confederate States, for the manufacture of thirty thousand rifles. From New Orleans they removed to Selma, Alabama, where they remained for a short time, and where the deed of trust referred to in the information was executed by them, not, however, directly to the so-called Confederate States, but to a disinterested individual as trustee, and not affecting the whole of the property embraced in the information, but only a part of the machinery and implements. It was made to operate as a mortgage, and as such, to secure the said so-called Confederate States for an advance of one hundred and fifty thousand dollars in so-called Confederate currency.

From Selma they removed to Athens, Ga. They there, in August and December, 1862, and January, 1863, by different deeds and in several parcels, acquired title to the land proceeded against by this information, some of which was paid for out of the above mentioned advance; and said advance was further secured by a mortgage upon the whole property, real and personal, executed in Georgia by Cook Brothers to the so-called Confederate States, on October 7, 1862. A similar mortgage, to secure another advance of one hundred thousand dollars in like currency, was executed in Georgia, on January 5, 1864.

The buildings upon the land, except a mill, were erected by Cook Brothers, in the years 1862 and 1863, and cost three hundred thousand dollars in Confederate currency. They were paid for in part out of the advances already mentioned, and in part with funds derived from other sources. They were made and used

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chiefly, though not exclusively, for the manufacture of arms.

At least two-thirds of the machinery, tools, &c., in the establishment, were on hand in and prior to the year 1861. Additions costing about seventy-seven thousand dollars in Confederate currency, were made there-to in the three following years, and, like the land and buildings, were paid for in part out of the advances of currency made by the so-called Confederate States.

Upon the premises, and with the machinery and im-plements covered by this information, the manufacture of arms was carried on by Cook Brothers, both mem-bers of the firm knowing of the same, and consenting thereto. They delivered, at Athens, to the government of the so-called Confederate States, between three thou-sand eight hundred and four thousand rifles, believing that the same were to be employed in the war then go-ing on against the United States; and the Confederate currency received by them in the years 1862, 1863, and 1864, from said pretended government, amounted to over six hundred thousand dollars. This was for rifles, horse-shoes, repairing old guns, &c., &c., with an ad-mitted balance in favor of said government, at the time of its overthrow, of sixty-nine thousand one hundred and four dollars, in said currency.

Coupled with the foregoing facts, the claimant's an-swer contained a formal denial of the motives, purposes, and intent charged in the information, and averred, on the contrary, that all these things happened in the course of business transactions—Cook Brothers being engaged simply in their ordinary vocation, and actu-ated solely by the desire of gain and the hope of le-gitimate profit.

The claimant, also, in bar of the information, pleaded the pardon of the president, bearing date December 11, 1865. He exhibited said pardon with proof that he accepted it on the day after its date, and of his

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having taken the oath of amnesty on the 29th of November preceding.

*H. S. Fitch*, United States Attorney, for the government.

*W. Dougherty* and *William H. Hull*, for claimant.

ERSKINE, J.—This is a proceeding *in rem*, instituted in this court at the March term, 1867, by the district-attorney, “who prosecutes for the United States and an informant,” to confiscate and condemn certain real and personal property, situate in Clark county, in this district, and known as the “Athens Armory.” The information contains four counts: three are founded on the act entitled “An Act to confiscate property used for insurrectionary purposes,” approved August 6, 1861, 12 *Stat. at L.* 319; and the fourth, on the act entitled “An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes,” approved July 17, 1862, *Id.* 589.

Section 1 of the act of August 6, 1861, is as follows:

“If during the present or any future insurrection against the government of the United States, after the president of the United States shall have declared, by proclamation, that the laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person or persons, his, her, or their agent, attorney, or employee, shall purchase or acquire, sell or give any property of whatsoever kind or description, with intent to use or employ the same, or suffer the same to be used or employed, in aiding, abetting, or promoting such insurrection or resistance to the laws, or any person or per-

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sons engaged therein ; or if any person or persons, being the owner or owners of any such property, shall knowingly use or employ, or consent to the use or employment of the same as aforesaid, all such property is hereby declared to be lawful subject of prize and capture wherever found ; and it shall be the duty of the president of the United States to cause the same to be seized, confiscated, and condemned.

"Sec. 2. Such prizes and capture shall be condemned in the district or circuit court having jurisdiction of the amount, or in admiralty in any district in which the same may be seized, or into which they may be taken and proceedings first instituted."

During the discussion of this case, various and very opposite views were presented by counsel, as to the sense in which the words "prize" and "capture," and the phrase "prizes and capture," as used in this act, are to be understood. But, I apprehend, that on a careful reading of the whole statute, the question will not prove difficult of solution. For, whether these naval and military terms—here evidently intended to include, not only seizures of property water-borne, but seizures of land, and of property found on land—were incautiously introduced into the statute, is not a matter for critical examination. No one can read this law, without learning from its entire perusal, that it was the controlling purpose of Congress, in enacting it, to make it one of the means to suppress the rebellion. Therefore, it is obvious, that it could not have been in the mind of Congress to confine these words or terms to their technical meaning exclusively ; for "prize means maritime captures only—ships, and cargoes taken by ships." 2 *Dods*. 446.

Statutes must not be so construed as to produce a result different from what was intended by the law-giver. Limit the term "prize" or "capture," as here employed, to a strict technical import, and the statute

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fails of its object, and becomes an absurdity; for, in many instances, cases have arisen fairly embraced within its purview, wherein the intention of the legislature would be defeated, if these terms were restricted to their narrow sense. This act was passed to confiscate property—"any property of whatsoever kind or description"—used or employed (after warning by proclamation), in aid of the rebellion; whether the contaminated property be found afloat, or on shore, or even if it be land itself.

A brief synopsis of such portions of the act of July 17, 1862, as were invoked in argument, may be given: Section 5 declares, that "To insure the speedy termination of the present rebellion, it shall be the duty of the president of the United States to cause the seizure of all the estate, property," &c., of the persons therein named, and to apply and use the same, and the proceeds thereof, for the support of the army.

The next section provides for the seizure of all the estate, &c., as in the preceeding one, of persons "other than those named as aforesaid," who being engaged in armed rebellion, or aiding or abetting the same, shall not, within sixty days after public warning and proclamation, cease to aid, countenance, and abet such rebellion, and return to their allegiance.

The seventh declares that "to secure the condemnation and sale of any such property, after the same shall have been seized," proceedings *in rem*, in the name of the United States, shall be instituted in any district court thereof, in which the property or any part of it may be found, or into which the same, if movable, may first be brought, and the proceedings "shall conform, as nearly as may be, to proceedings in admiralty or revenue cases;" and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid and comfort thereto, "the same shall be condemned as ene-

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mies' property, and become the property of the United States," &c.

This act also makes all sales, transfers, and conveyances of any such property null and void; "and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described," in the fifth or sixth section.

The capture, or—more accurately—the seizure before the court, consists of realty, and of personalty found on land. A capture, in technical language, is a taking by military power; a seizure, a taking by civil authority; and it is upon the latter mode of gaining possession that the district-attorney has counted in the information.

These statutes, being laws to work forfeitures, or confiscations of property, are within that class which require a close construction. But notwithstanding the rule, that in statutes of this kind, the intention is to be attained by strict interpretation, it is nevertheless the duty of the judge to give full expression to the legislative will,—“to ascertain which will,” says BISHOP (1 *Crim. Law*, § 231) “is the great end of all interpretation.” *United States v. Eighty-four boxes Sugar*, 7 *Pet.* 453; *The Enterprise*, 1 *Paine*, 32; *United States v. Wigglesworth*, 2 *Story*, 369; *Taylor v. United States*, 3 *How.* 197; *Attorney-General v. Radloff*, 10 *Exch.* 84.

Both acts are simply municipal laws; consequently, the government cannot demand, nor the claimant oppose, the confiscation of any of the property covered by the information, by force of the law of nations; each must rely for success on the statutes alone. In the source from whence they spring, and in their effect, as real or personal statutes, they differ essentially from those laws which regulate the intercourse of independent or foreign nations.

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The district-attorney, in replying to the question made by the counsel for the claimant as to the proper mode of procedure and trial to be adopted in the adjudication in this case, said : "The proceedings for condemnation, under the act of August 6, 1861, of such 'prize and capture,' should conform to proceedings in admiralty causes; and such," continued the counsel, "has been the construction placed upon the act by the United States court of Alabama, in similar cases."

I have not been favored with the perusal of any ruling of the federal courts for Alabama, on this question. This I regret. But after a careful resolving of the statute itself, I am constrained to entertain the opinion, that neither in its words nor in its essence does it warrant the conclusion, that in seizures of land, or of property seized on land, the proceedings for condemnation should conform to proceedings in admiralty, further than what may be necessary, in a suit *in rem*, to initiate the cause and shape it for trial.

The principles governing the district courts of the United States in the determination of seizures of this kind are in accordance with the common law, and the trial has, hitherto, been in pursuance of the manner of the English exchequer on informations *in rem*, where the decision of issues of fact devolve on a jury. This court cannot undertake to say that the national legislature, in passing this statute, contemplated the expansion of the jurisdiction of the admiralty, so far beyond what was understood and intended by it at the time of the formation of the Constitution, as to withdraw from the suitor, in a seizure like this, the right of a trial by jury, and to transfer the determination of the cause to the breast of a single judge.

United States v. The Betsey, 4 *Cranch*, 443; Six hundred and fifty-one chests of Tea v. United States, 1 *Paine*, 499; United States v. Fourteen Packages, *Gilp*. 235; The Sarah, 8 *Wheat*. 391.

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Section 9, chap. 20 of the judiciary act conferred, *inter alia*, on the district courts, exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, and of all seizures on land and on water, and of all suits for penalties and forfeitures incurred under the laws of the United States, "saving to suitors, in all cases, the right to a common law remedy, where the common law is competent to give it." And Mr. Justice FIELD, in delivering the opinion of the supreme court of the United States, in the case of *The Moses Taylor*, 4 *Wall.* 411, gave the following comprehensive exposition of this reservation: "It is not a remedy in the common law courts, which is saved, but a common law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute."

The judiciary act confined the original cognizance of suits for penalties and forfeitures to the district courts exclusively. But the act of August declares, that property used or employed for insurrectionary purposes shall be "lawful subject of prize and capture wherever found," and that "such prizes and capture shall be condemned in the district or circuit court having jurisdiction of the amount;" thus bestowing upon the latter court concurrent original cognizance with the district court, when the amount is sufficient. And if the district court for this district proceed by virtue of the circuit court powers bestowed on it by act of August 11, 1848, the course of proceeding and trial must, on principle, be the same as in the district court proper.

I would here remark that if the views which I have expressed on the act of August are erroneous;—if, under this statute, the procedure and trial in seizures like this, instead of being in pursuance of the rules of the

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common law, should be in conformity to those of the admiralty or civil law ;—then a peculiar anomalous jurisdictional diversity arises, and opposite modes of trial follow ; the first three counts in the information would be decided by the judge alone, and the fourth by a jury.

During the discussion of some of the foregoing questions, the court intimated that the trial for the condemnation of this property must be according to the course of the common law. The counsel then agreed to dispense with the intervention of a jury, under section 4 of the act of March 3, 1865, 13 *Stat. at L.* 501, for the purpose of casting the trial of the issues of fact upon the court ; and to effect this, they filed a stipulation with the clerk, as required by that section of the act.

But to impose the trial and determination of issues of fact on the court, two things are necessary : 1. It must be a civil case. 2. It must be pending in a circuit court. Under the act of August, as remarked, the proceedings, without regard to amount, may be instituted in the district court, and, concurrently with it, in the circuit court, when the amount is sufficient to give the latter jurisdiction ; while all proceedings under the act of July must be brought in the district court.

This is, as already observed, a proceeding *in rem* ; an information filed by the district-attorney, *ex-officio*, who prosecutes for the United States and an informer, to enforce the condemnation of realty, and of personally seized on land. The act of August provides that the attorney-general, or district attorney, “ may institute proceedings of condemnation ;” but the name or the nature of the remedy to be adopted in effectuating the condemnation is not given ; and, therefore, what is a proper remedy can be inferred only from the spirit of the statute and its evident object.

The act of July, however (to which informers are un-

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known); is more definite. It declares that, "to secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be made available for the purposes aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any district thereof," &c. ; "which proceedings shall conform as nearly as may be to the proceedings in admiralty or revenue cases."

For the government, it was said that these statutes are remedial laws, and clearly distinguishable from penal or criminal statutes. Whereas, on the part of the claimant, it was insisted that they are criminal laws, and that the confiscation inflicted by them is a punishment for crime; and further, that an information *in rem* is not a suitable remedy by which to invoke a judgment of confiscation.

Whether these statutes are remedial laws, as contra-distinguished from penal or criminal enactments, is an intricate and perplexing question—inwrapped in doubt, and difficult to determine so as to satisfy the judicial mind. They are of a nature peculiar to themselves, and cannot, I think, be assigned to any particular department of jurisprudence.

By the district-attorney these acts were likened also to revenue laws. The argument failed to convince. Mr. Justice GRIER, in pronouncing the decision of the court in *Francis v. United States*, 5 *Wall.* 338, remarked that the act of August 6, 1861, "is not an act for the collection of revenue." What was there said will apply with still greater force to the act of July 17, 1862.

Counsel for the claimant contended that confiscations under these statutes are in no manner different from forfeitures of enemy property in times of war; and that the law of nations is the touchstone for construing them. To this argument the Prize Cases, 2 *Black*, 635, would seem to furnish an answer.

In ulterior consequences, these statutes appear to

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me to resemble those laws enacted by some of the States during the war of independence, by which the estates of persons absenting themselves from the country, lapsed, or escheated, or were otherwise forfeited to the people. *Gilbert v. Bell*, 15 *Mass.* 44; *Borland v. Dean*, 4 *Mas.* 174.

After the careful perusal of the acts of August and July, I am inclined to be of the opinion, that there are some portions of each which may be found to possess a nearer affinity to criminal law, than to remedial jurisprudence. But the question will receive no discussion, as a decision upon it is not essential. If, however, it were necessary to decide it, some aid might be gathered from the case of *Fisher v. McGirr*, 1 *Gray*, 1.

Under the act of August, the offense stamps itself primarily on the property,—that is the offender; and its forfeiture is the consequence of the act of the owner in knowingly using it, or consenting to its employment for illegal purposes. His transgression—in acquiring or disposing of property with intent to use or employ it, or to suffer it to be used or employed, in aiding, abetting, or promoting rebellion; or, being the owner of property, knowingly using or employing or consenting to the use and employment of it as aforesaid—is the point upon which the confiscation turns. But under the act of July, the offense impresses itself primarily on the owner,—he is the offender; and the forfeiture of his property is a penalty inflicted for his crime. And, under this last act, it is not necessary, to work the forfeiture, that the property be adherent to the rebellion.

Concurrent with, and explanatory of this statute, Congress passed a joint resolution, which, *inter alia*, provides as follows: “Nor shall any punishment or proceeding, under said act, be construed so as to work a forfeiture of the real estate of the offender beyond his natural life.” 12 *Stat. at L.* 627.

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It was insisted on behalf of the claimant, that these statutes are unconstitutional and void ; and, if not so, that they expired with the rebellion. But as the claimant, among other matters relied on by him, has, to his claim and answer, superadded a plea of pardon, the court is relieved from considering either of those propositions.

As to the question raised, whether the proceeding instituted by the government to confiscate this property is a civil suit or a criminal proceeding, Mr. Justice STORY, in an anonymous case, 1 *Gall.* 22, said : " But it is not true that informations *in rem* are criminal proceedings. On the contrary, it has been solemnly adjudged that they are civil proceedings." And see *The Palmyra*, 12 *Wheat.* 1.

The case of the *United States v. La Vengeance*, 3 *Dall.* 297, was an information filed by the district-attorney, founded on a statute prohibiting the exportation of arms and ammunition. It was argued that the proceeding was of common law jurisdiction, and a criminal cause. But the court held it to be of admiralty jurisdiction. And Chief Justice MARSHALL, in the course of the opinion said, " In the next place, we are unanimously of opinion that it is a civil cause ; it is a process in the nature of a libel *in rem* ; and does not, in any degree, touch the person of the offender."

These cases were in admiralty.

Notwithstanding the action *in rem* may be deemed a civil proceeding, yet it is held to be a proper remedy to enforce a forfeiture incurred under the provisions of a penal statute. *United States v. Eighty-four boxes of Sugar*, *supra*. See 2 *Pars. Maritime Law*, 682 ; *Attorney-General v. Radloff*, *supra*.

This last case arose on an information filed to recover penalties for smuggling. Counsel for defendant proposed to call the defendant himself as a witness on behalf of the defense, under an act allowing parties, in

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civil cases, to testify on their own behalf. The crown objected, and the objection was allowed. A rule *nisi* followed, and it was heard before the court of exchequer.

The point in judgment was under an act of Parliament declaring that "all penalties or forfeitures incurred or imposed by this or any other act relating to the customs, or to trade or navigation, shall and may be sued for, &c., by action of debt, plaint, bill, or information," &c. MARTIN and PLATT, BB., held, that the information filed under this section was not a criminal proceeding, and, therefore, the defendant was improperly rejected. But PARKE, B., and POLLOCK, C. B., decided that it was a criminal proceeding. Said the former: "An information by the attorney-general for an offense against the revenue laws, is a criminal proceeding—it is a proceeding instituted by the crown for the punishment of a crime—for it is a crime and an injury to the public to disobey statute revenue law, and, accordingly, the old form of proclamation, made before the trial of informations for such offenses, styles these offenses 'misdemeanors.'" The opinion of POLLOCK, C. B. (who tried the case below), was to the same effect.

The court being equally divided, the rule was dropped, and, consequently, the decision at *nisi prius* remained undisturbed.

But it has already been seen that these statutes are not revenue laws. They are, in fact, the fruit of a more vigorous exertion of the powers of the government than takes place in passing laws simply for the collection of revenue. The general object of revenue laws is merely the collection of duties and taxes, though they may impose fines and ~~work~~ forfeitures of property.

In the first count of the information it is alleged, that after the passage of the act of August 6, 1861, and after the promulgation of the president's proclamation

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in pursuance thereof, and during the rebellion, Cook Brothers, for one hundred and fifty thousand dollars, granted, bargained, sold, and conveyed the property embraced in the information, to the so-called Confederate government, knowingly, with intent that the same should be used and employed for insurrectionary purposes. In the other counts, based on this statute, it is alleged that Cook Brothers mortgaged this property to the so-called Confederate government, after the passage of the act and the publication of the proclamation, knowingly, and with intent that it should be used and employed in aiding and promoting the rebellion. I have carefully examined all the conveyances relied on by the district-attorney, and find them to be, in every instance, deeds of mortgage.

Now, if the rule of the common law prevailed in this State, the legal title would undoubtedly have passed to the so-called Confederacy; but here a mortgage is a mere security for the debt, and nothing more.

In *Davis v. Anderson*, 1 *Kelly*, 176, the court said, that "a mortgage in Georgia is nothing more than a *security* for a debt, and the title in the mortgaged property remains in the mortgagor until foreclosure and sale in the manner pointed out by the statute." Other cases followed to the same effect. 4 *Ga.* 169; 10 *Id.* 66, 300; 27 *Id.* 389. In *Jackson v. Carswell*, 1 *Bleckley* (34 *Ga.*), 279, the same court, in express terms, per WALKER, J., affirmed *Davis v. Anderson*. So this question, in the doctrine of mortgages, may be considered as settled in Georgia.

Mr. Justice DAVIS, in pronouncing the opinion of the supreme court of the United States in the case of *Chicago v. Robbins*, 2 *Black*, 418, said: "Where rules of property in a State are fully settled by a series of adjudications, this court adopts the decisions of the State courts." See *Id.* 428

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It is in evidence that Ferdinand W. C. Cook, of the late firm of Cook Brothers, died in 1864. The surviving partner, Francis L. Cook, interposes, and claims the legal title to the property before the court. In his claim and answer to the information, and likewise in his responses to certain special interrogatories propounded by the government, he confesses that, upon the premises, and with the machinery and implements, the manufacture of arms for the so-called Confederate government was carried on by Cook Brothers, both members of the firm knowing of the same, and consenting thereto, and believing that the arms were to be used and employed in the war then going on against the government of the United States.

He adds to the foregoing confession a formal denial of the motives, purposes, and intent charged in the information, and avers that all these things happened in the course of business transactions, Cook Brothers being workers in iron, and engaged simply in their ordinary vocation, and actuated solely by the desire of gain, and the hope of legitimate profit.

But that Francis L. Cook cannot thus purge himself of the offenses just confessed,—voluntarily fabricating arms for the so-called Confederate government, and believing, at the very time, that they would be employed in levying war against his country; and knowingly using and consenting to the employment of the property covered by the information, for insurrectionary purposes,—is a principle of the criminal law too well established to bear discussion. *Respublica v. McCarty*, 2 *Dall.* 86; *United States v. Vigol*, *Id.* 346; *Ex p. Bollman*, 4 *Cranch*, 75, 126.

In addition to the many matters discussed during the hearing of this cause, the district-attorney alluded to a balance admitted by the claimant to be due by him to the rebel government, at the date of its downfall, amounting to sixty-nine thousand one hundred and

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four dollars, in "Confederate treasury notes." But this question cannot be adjudicated in a suit *in rem*.

The claimant interposed a plea in the nature of a plea of pardon, alleging that pardon was granted to him by the president of the United States, on December 11, 1865, and prior to the issuing of the warrant of arrest.

In his plea, he alleges that the president granted to him (using the words of the grant) "a full pardon and amnesty for all offenses by him committed, arising from participation, direct or implied, in the rebellion,"—adding an averment, that he has performed all and singular the conditions therein contained, and prays judgment and a writ of restitution.

The pardon was produced, and inspected by the court. It contains the following conditions, to wit: 1. That he shall take the oath prescribed by the president in his proclamation of May 29, 1865. 2. That he shall never acquire any property whatever in slaves, nor make use of slave labor. 3. That he shall "first pay all costs accrued in any proceedings instituted or pending against his person or property before the date of the acceptance of this warrant." 4. That he "shall not by virtue of this warrant, claim any property, or the proceeds of any property that has been sold by the order, judgment, or decree of a court under the confiscation laws of the United States." 5. That he shall notify the secretary of state, in writing, that he has accepted said pardon. A copy of the acceptance was annexed to the plea, and bears date December 12, 1865.

In proceeding to inquire into the legal effect of this pardon, it may be borne in mind that the documentary proofs show that it was granted on December 11, 1865, accepted on the ensuing day, and the proper officer notified. That the warrant of arrest was issued on November 22, 1865, and very shortly there-

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after the property was seized by the marshal ; and at the March term, 1867, of this court, the district-attorney filed the information.

It is manifest from the language of the pardon itself, without resorting to construction, that the executive, by this warrant or grant to Francis L. Cook, not only forgave and buried in oblivion all offenses by him committed, arising from participation, direct or implied, in the rebellion ; but also clearly intended to restore to him all his confiscable property. Observe the words, found in the premises,—"full pardon and amnesty,"—words the most comprehensive and potent that could be employed to carry out this intention. And if the grantee has performed all conditions precedent, and has not violated any of the conditions subsequent, then all the right, title, and immunities bestowed by the grant, vested, and continues vested in him ; and—if the charter of pardon be construed agreeably to the laws of this State—in his heirs.

If this last conclusion is sound, it may be assumed—provided the conditions subsequent, in the pardon, were affirmative conditions, and not personal and inseparable from the grantee—that had he died before complying with these conditions, his heirs could come in and comply ; premising, of course, that the forfeitures or confiscations imposed under the provisions of these statutes, extend beyond the life of the grantee. This question might arise under the act of August, but not under the act of July, unless personal estate is included in the term "forfeiture" as understood in section 3 of article 3 of the Federal Constitution. And this proposition is equally as applicable to personal representatives as to heirs. Sir Edward Phitton's case, 6 *Rep.* 79 b, is in point. Sir Edward was outlawed at the suit of one R. after judgment, and before the general pardon of 43 *Eliz.* ; and after the pardon Sir Edward died. The court held, that his executors could

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avail themselves of the pardon, and have the benefit of it; and this, too, whether executors or administrators were named in it or not. Citing Lord Mordaunt's case, *Cro. Eliz.* 294.

A pardon is an act of mercy flowing from the fountain of bounty and grace; its effect, when it is a full pardon, is to obliterate every stain which the law attached to the offender, to place him where he stood before he committed the pardoned offense, and to free him from the penalties and forfeitures to which the law had subjected his person and property:—"to acquit him," says Sir WILLIAM BLACKSTONE, "of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon." 4 *Com.* 402.

"A pardon," says Lord COKE, "is a work of mercy, whereby the king, either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical. All that is forfeited to the king by any attainder, &c., he may restore by his charter." 3 *Inst.* 233 d.

The King v. Grenvelt, 12 *Mod.* 119. Motion to discharge Dr. Grenvelt from a fine, *pro mala praxi*. It was urged, that the king having granted the fines to the college, he could not by his own pardon destroy his own grant; and that the fines remained notwithstanding.

"But *per* CURLIAM, *seriatim*: The penalty *pro mala praxi*, is only a satisfaction to the public justice, and not to the party, who had his action on the case; and that whenever a crime is pardoned, all the effects and consequences thereof are discharged; that when an act of Parliament appoints a fine for a public offense, such fines, of common right, belong to the king, unless they are otherwise particularly disposed; that the king, by granting away his fines, does not extinguish his power of pardoning, for that would be an extinguishment of his prerogative by implication; and the power of

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pardoning being inseparably annexed to the crown, and not grantable over, the king therefore pardoning this offense, before the fine actually imposed, whereby an interest would have vested in the grantee, the offense was thereby gone, and the penalty pending thereon discharged."

In *Exp. Wells*, 18 *How.* 307, it was said by a distinguished jurist—Mr. Justice WAYNE,—in pronouncing the opinion of the court, that "when the words, to grant pardon, were used in the constitution, they conveyed to the mind the authority as exercised by the English Crown, or by its representatives in the colonies. . . . We must, then, give the word the same meaning as prevailed here and in England, at the time it found a place in the constitution."

Mr. Justice FIELD, in delivering the opinion of the court, in *Exp. Garland*, 4 *Wall.* 333, said: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense."

Although laws are not framed on principles of compassion for guilt; yet when Mercy, in her divine tenderness, bestows on the transgressor the boon of forgiveness, justice will pause, and, forgetting the offense, bid the pardoned man go in peace.

*Judgment.*—On hearing the above cause, and having inspected the charter of free and full pardon granted by the President of the United States, on December 11, 1865, (before any judicial proceedings had been instituted in court for the condemnation of the property covered by the information), to Francis L. Cook, the claimant, and by him pleaded in bar of these proceedings, it is considered and adjudged by the court

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here, that the said plea of the claimant be allowed, and that this cause be dismissed, and it is so ordered.

The court adjudges nothing further.

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FOX v. HEMPFIELD RAILROAD COMPANY.

*Circuit Court, Third Circuit; Western District of Pennsylvania, December T., 1870.*

CORPORATIONS.—EXECUTION AND LEVY.—JURISDICTION.

The act of 1870 does not repeal any of the preliminaries before levy and sale, required by section 75 of the act of 1836, in proceeding against a corporation, but is "in addition" thereto. The preliminaries required by the former act are still essential to the validity of a levy.

Where the supreme court of a State has, by its decree and authorized officers, taken judicial control of the property and franchises of a corporation, and ordered their sale, they cannot be taken in execution by process from any other jurisdiction.

Motion to set aside execution and levy against the defendant.

*Burgwin and Shiras*, for the motion.

*Kirker and Schoyer*, opposed.

McCANDLESS, J.—On November 23, 1860, the plaintiff obtained in this court two several judgments against the Hempfield Railroad Company, amounting

now, in the aggregate, to a sum exceeding seventy thousand dollars.

These judgments were subsequently revived, and a *fi. fa.* issued, by virtue of which the marshal, on October 12, made a levy upon the road, its rolling stock and franchises, and all its property, real and personal.

The road was chartered by Pennsylvania, to run from Greensburg, in Westmoreland county, to a point on the western boundary of the State, and Virginia granted a similar charter, so as to make a continuous road from Greensburg to Wheeling. The road has only been completed and operated from Wheeling, in the State of Virginia, to Washington, in the State of Pennsylvania.

A motion is now made to set aside the execution and the levy for several reasons assigned, to two of which it is alone necessary to refer.

It is contended, and the point is well taken, that this levy under the act of 1870, has been prematurely and illegally made. This supplementary act, which I hesitated to adopt as part of the process of this court, because of the sharpness of its practice, is amendatory of section 72 of the act of 1836. It provides that *in addition* to the provisions of the seventy-second section, and *in lieu* of the proceeding by *sequestration*, the plaintiff may have execution by *fi. fa.*, commanding the officer to levy the sum due of any personal, real, or mixed property, franchises, and rights of the corporation, and proceed to sell the same. It does not repeal any of the preliminaries, before levy and sale, required by section 72 in proceeding against a corporation, but it is "in addition" thereto. What is necessary to be done before you arrive at the point of sequestration, for which this process is designed to be a substitute? Section 72 provides that executions against corporations shall be executed in the following manner: The officer shall go to the principal office of the corporation during

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the usual office hours, and demand of the president, or other officer having charge of such office, the amount of such execution, with legal costs. If no person can be found on whom demand can be made, or if the amount be not forthwith paid after demand be made, the officer shall seize the personal property of the corporation sufficient to satisfy the debt. If no sufficient personal property be found, the officer shall levy upon the real estate of the corporation and proceed as in other cases for the sale of land. When the execution issued is *returned* unsatisfied, in whole or in part, *then* begin the proceedings by sequestration, which the supplementary act of 1870 was designed to supplant. This course of proceeding divests the statute of many sharp features which render it obnoxious to criticism, and affords the corporation ample notice of its peril, before its property and valuable franchises can be seized and sold. For it will be remembered that this levy and sale is in addition to the provisions of section 72, and was intended to relieve the creditor and the courts of the cumbrous machinery of sequestration, which was found inadequate to meet the exigency of the case.

As none of these essential preliminaries have been complied with, this levy must be set aside.

Here we arrive at a consideration of graver consequence, which goes to the merits of the question submitted. Shall we, by the process of the courts of the United States, interfere with a court of competent jurisdiction, which has already assumed the control and custody of the whole property of the corporation? Conflicts of jurisdiction are to be avoided as well from necessity as from comity.

On the 27th of June, 1855, the Hempfield Railroad Company executed a mortgage to certain trustees, which, with its supplements, was given to secure the payment of the bonds of the company to the amount

of one million dollars. Interest in a sum exceeding three hundred thousand dollars having accrued upon these bonds, the bondholders filed their bill in the supreme court of Pennsylvania, praying for a foreclosure and sale of the mortgaged premises, and a distribution of the proceeds among the creditors of the corporation. After some delay and much litigation, in which the validity of the mortgage was called in question, that high court, on the 10th day of April, 1869, *inter alia*, decreed a sale of all the property and franchises of the company upon the 1st of March next, upon the failure to pay, on the 30th of the present month, the coupons ascertained to be due.

It was urged with much force at the argument, that the plaintiff decedent in this case being a contractor who had expended his time and labor in the construction of the road, by virtue of the act of 1843, the mortgage must be postponed, and as to him was utterly null and void.

Whatever may be the merits of his claim as to priority under the statute, the validity of this mortgage cannot be controverted in a collateral proceeding here or elsewhere. The judgment of the supreme court as to its binding force, whether this question as to the act of 1843 was raised or not, is conclusive upon this and all other courts. The plaintiff is at liberty to contest his priority yet, in that forum, upon the question of distribution. The fact that his claim has passed into judgment in a court of the United States, does not deprive him of the rights of a creditor in the tribunals of the State.

The supreme court of Pennsylvania having, by its decree and authorized officers, taken judicial control of the property and franchises of this corporation, and ordered their sale, they cannot be taken in execution by process from any other jurisdiction. Mr. Justice McLEAN, in 10 *Pet.* 401, says, the first levy, whether it

was made under the federal or State authority, withdraws the property from the reach of the process of the other. A most injurious conflict of jurisdiction would be likely often to arise between the federal and State courts, if the final process of the one could be levied on property which had been taken by the process of the other. Property once levied on remains in the custody of the law, and is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under a different jurisdiction. Similar doctrine is held in 8 *How.* 107; 14 *Id.* 52, 374, and in 20 *Id.* 503. Judge AGNEW, also, in a recent case cited at bar from the *Legal Journal* of November 9, 1870, adheres to the same rule. And as it will be borne in mind that a part of the property levied on in the present case is in the State of Virginia, and beyond our territorial jurisdiction, we may adopt his language, that "if the property may be taken piecemeal, the remedy of the creditors under the mortgage would become worthless, or at least greatly imperiled."

The *fi. fa.* having regularly issued to collect the fruits of the judgment, although wanting in the preliminaries to the levy for its proper execution, it may be said there is no good reason why the court should recall it. But, as pending the decree of the supreme court, the plaintiff can take nothing, except litigation, by his writ, it is set aside.

Rule absolute, and the levy and execution set aside.

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*Carey v. Nagle.*

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## CAREY v. NAGLE.

*District Court, District of Wisconsin; February T.,  
1870.*

## INSURANCE.—PREMIUM NOTES.

By a supplement to its charter, a mutual insurance company was authorized to insure "for a specific rate of premium to be paid in cash, in the same manner as insurance companies" not mutual "are accustomed to do." The object of the supplement was to enable the company to issue two classes of policies, one on the mutual, and the other on the non-mutual plan, the premiums on the latter to be paid in cash. *Held*, that the company might accept a note for such premium, instead of cash; the taking it being a mere extension of the time of payment, and none the less a payment in cash.

The bankruptcy of the company is no defense to an action by the assignee of a note given for the premium on a policy of insurance.

## Trial of an action upon a promissory note.

This was an action by the assignee in bankruptcy of the Milwaukee Insurance Co., to recover the amount of a note made by the defendants to the company for a policy, for two hundred and forty dollars, payable in sums of sixty dollars on the first day of May annually for four years, without interest until due, and in case default should be made in the payment of any of the installments, then the whole to become due.

The company was incorporated and did business for several years as a mutual insurance company, issuing policies and taking back notes, such policy holders being members of the company.

By the act to amend the act to incorporate the company, it was provided that "the company shall have power in their discretion to make any and all insurance

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which by law they are or may be authorized to make, to any person or persons with whom they may agree to that effect, for a specific rate of premium to be paid in cash, in the same manner as insurance companies other than mutual insurance companies are accustomed to do. And in all such cases the insured shall not become members of the company, nor in any wise entitled to any share of the profits, premiums, or earnings, nor in any wise liable for the losses, debts, or liabilities of the said company, and all premiums received for such insurance shall be passed to the general credit of the company, and all losses growing out of said special policies shall be paid in like manner as losses under the ordinary policies of the company."

*Mr. Mann*, for plaintiff.

*Mr. Butler*, for defendant.

MILLER, J.—A policy was issued for four years, under the amendment to the charter of the company, upon receipt of the note in suit for the payment of the annual premium. It is contended by the defendant's counsel that the premiums should be paid in cash simultaneously with the delivery of the policy, and that the company could not accept a note payable at a future time. The object of the amendment to the charter was to vest in the company the additional power to issue policies as a stock company for a specific rate of premium to be paid in cash. Insurance under this act may be made in the same manner as by other insurance companies not mutual. Policy holders stand in a different relation to the company from those under the mutual system. The insured under the amended charter are not members of the company, nor entitled to a share of the profits, premiums, or earnings of the company, nor subject to losses. I do not think the act requires premiums to be paid simultaneously with de-

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livery and acceptance of policies. The act authorizes the company to make insurance to any person for a specific rate of premium to be paid in cash, in the same manner as stock companies. The company was not prohibited from extending the time of payment of premiums in cash. The company could transact business, in this respect, as other companies, and make its agreement with the insured as to the time of payment of premiums in cash. The note was a mere regulation of the time of payment, for the accommodation of the defendants. The premium was to be paid in cash, but the time of payment was extended. There is no statute law prohibiting such extension. The policy issued to these defendants imports a settlement of the premiums to the satisfaction of the company simultaneously with its execution and delivery, and binds the company in case of loss by fire, even if the note had not been given, or if the insured should become insolvent and unable to pay the premium. It is an every-day practice with stock companies to issue policies upon credit, containing exemption from liability on non-payment of the premiums. A provision in a policy duly executed, that no insurance, whether original or continued, should be binding until the actual payment of the premium, and the written acknowledgment thereof, does not invalidate a subsequent contract by parol, to renew such insurance for a premium not paid at the time the risk attaches, but postponed to a future day. *Trustees v. Brooklyn Ins. Co.*, 19 *N. Y.* 305. In *Insurance Company v. Sturgis*, 2 *Cow.* 664, notes were received for premiums. See, also, *Commercial Ins. Co. v. Union Ins. Co.*, 19 *How.* 318; *Furniss v. Gilchrist*, 1 *Sandf.* 53; *McIntyre v. Preston*, 5 *Gilm.* 48; *Hamilton v. Lyecoming Ins. Co.*, 5 *Barr.* 339. The contract between the insurer and the insured is mutual, but independent, and failure of one party literally to comply on his part does not exempt the other from liability. I am

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satisfied that under the amended charter, the company, had lawful authority to issue policies, upon a simultaneous payment of the premiums in cash, or upon an extension of the time of payment by taking a note, or even without a note or security.

It is not necessary to consider the question, whether the defendants are estopped from making this defense.

The note in suit is a portion of the capital of the company for the payment of losses by fire. If defendants' property, covered by the policy, had been damaged or destroyed by fire, the company was bound by its contract of insurance to pay the loss. And in case of distribution of assets among creditors under the bankrupt act, defendants would be entitled to their *pro rata* share. The note, being accepted by the company in lieu of cash paid at the date of the policy, is recoverable as so much assets, and defendants are in no worse condition by giving the note in lieu of paying the premium. *Hone v. Boyd*, 1 *Sandf.* 481; *White v. Haight*, 16 *N. Y.* 310; *Sterling v. Ins. Co.*, 32 *Pa. St.* 75; *Sands v. Hill*, 42 *Barb.* 651; *Huntley v. Beecher*, 30 *Id.* 580; *Alliance Ins. Co. v. Swift*, 10 *Cush.* 433; *Huntley v. Merrill*, 32 *Barb.* 626; *Clark v. Middleton*, 19 *Mo.* 53. Upon the same principle, the insolvency of a corporation is no ground for restraining collection of subscriptions for stock. *Dill v. Wabash R. R. Co.*, 21 *Ill.* 91. And stockholders are liable on their subscription to the stock of an insolvent company. *Ogilvie v. Knox Ins. Co.*, 22 *How.* 380.

Judgment for plaintiff.

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The Caroline E. Kelly.

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THE CAROLINE E. KELLY.

*Circuit Court, Third Circuit ; Eastern District of  
Pennsylvania, 1870.*

MERCHANT SEAMEN.—DESEPTION.

A seaman, by the consent, and with the assistance of the mate, but unknown to, and without the permission of the master, who was on board, left the vessel. *Held*, that the seaman was not guilty of desertion, nor liable to the forfeiture of the arrears of his wages.

A seaman leaving a vessel under such circumstances is discharged ; and if such discharge occurs in a foreign port, he is entitled to three months' extra wages, under section 2 of the act of February 28, 1803, in addition to the arrears of his stipulated wages.

When the absence of a seaman from his vessel is set up to affect him prejudicially, the permission of the temporary commanding officer must be taken as giving a sanction which prevents the penalty for desertion from attaching.

Appeal from a decree of the district court.

This was a libel *in rem* by Patrick Doherty, a seaman on board of the brig Caroline E. Kelly, against that vessel, to recover arrears of wages, and also three months' extra wages, two-thirds thereof to be paid to himself and the other third to remain for the use of the United States, under the act of February 28, 1803, section 2, which provides that whenever a ship or vessel belonging to a citizen of the United States, shall be sold in a foreign country, and her company discharged, or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master or commander to produce to the consul, vice-consul, commercial agent, or vice-commercial agent, the list of his

ship's company certified as aforesaid ; and to pay to such consul, vice-consul, commercial agent, or vice-commercial agent, for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months' pay, over and above the wages which may then be due to such mariner or seaman ; two-thirds thereof to be paid by such consul or commercial agent, to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen or maimed citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute and may be in such foreign port.

The district court decreed in favor of libellant, whereupon respondent appealed.

The facts which governed the decision of the case are sufficiently set forth in the opinion.

*Morton P. Henry*, for appellant.

*George P. Rich*, for respondent.

McKENNAN, J.—The decisive question in this case is one of fact, and under the direct and uncontradicted proofs, it is not of difficult solution.

On January 18, 1870, the libellant shipped as seaman on the brig *Caroline E. Kelly*, of which the respondent is master, at the wages of twenty-five dollars per month, for a voyage from Mobile to Matanzas, Cuba, and thence to any port north of Cape Hatteras. The vessel sailed immediately, and duly reached Matanzas. While she was in the harbor of that place, the libellant's finger became painfully sore, so as measurably to unfit him for duty. Difficulties having occurred

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The Caroline E. Kelly.

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between him and the master during the voyage, and his finger growing worse, he was told by the first mate, that, by going into cold weather, he might lose his hand, and probably his life, that he ought to go to Havana and get into the hospital, and that if he wished, he, the mate, would give him an opportunity to leave the vessel, and would pay his passage to Havana. Within a day or two afterwards he was called up by the mate at a very early hour in the morning, while the master was in bed, was taken ashore in the ship's boat by the mate, accompanied to the railroad, put on the cars, and his fare paid to Havana. This occurred February 16th, and on the 18th the vessel sailed for the United States. The mate on that day made an entry in the log-book that "Pat, a seaman, had deserted."

Under these circumstances, even if a proper entry of libellant's absence had been made in the log-book, it is plain that the crime of desertion is not to be imputed to him, and that the arrears of his wages were not forfeited.

Was he discharged with his own consent within the meaning of the act of Congress of February 28, 1803?

Although at the time the libellant left the vessel the master was aboard, yet the mate was actually in command, and was, therefore, temporarily invested with the functions of a commanding officer. The care of the ship and the government and management of the crew were necessarily within the scope of his authority, while he was potentially in charge of both. His acts are to be considered as constructively the acts of the master, *pro hac vice*. Whatever may be the extent of his authority, or of his accountability to his employers for an abuse of it, the seamen are subject to his direction, and his permission of an act to be done by any of them is sufficient to divest it of the character, and rescue it from the punitive consequences of a willful and

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The Caroline E. Kelly.

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insubordinate violation of duty. So far, then, as the absence of a seaman from his vessel is set up to affect him prejudicially, the permission of the temporary commanding officer must be taken as giving it an authorized sanction.

Here the libelant left the vessel, not only with the knowledge and consent, but by the distinct advice and procurement, and with the indispensable assistance of the officer in charge at the time, and was sent away to a distant place without the means of returning before the vessel sailed if he had desired to do so. Nor can the effect of these facts be averted by the respondent's alleged ignorance of the libelant's intended withdrawal, especially as he did not manifest any earnest or unequivocal disapproval of the conduct of the mate, but at once proceeded to employ another seaman, and sailed on the return voyage, without taking any steps whatever to reclaim the libelant.

Under all the evidence, in furtherance of the humane object of the act of 1803, we must hold that the libelant was discharged. This having been done in a foreign port, and with his consent, it follows that he is entitled to recover the three months' wages allowed by that act, in addition to the arrears of his stipulated wages, and the whole case was rightly decided by the learned judge of the district court.

Decree accordingly.

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The Galloway C. Morris.

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THE GALLOWAY C. MORRIS.

*Circuit Court, Third Circuit; Eastern District of  
Pennsylvania, June T., 1870.*

MERCHANT SEAMEN.—LIEN FOR WAGES.—“STALE.”

A seaman claiming a certain sum for wages due him, was refused payment of a portion of it, unless he would sign a receipt in full against the schooner and her owners, and look to the captain for the balance. *Held*, that his receipt, signed under such circumstances, was good only for the sum actually paid.

Where there has been no change of ownership in a vessel, forbearance by a seaman to enforce his lien on it for wages due, until after twenty-one months' continuous service, does not render his claim stale.

What is a stale claim,—considered.

Appeal from a decree of the district court in admiralty.

*J. W. Coulston*, for appellant.

*R. P. Kane*, for respondent.

McKENNAN, J.—By the settled principles of maritime law, mariners' wages are secured by a specific lien upon the ship and freight, and by the personal liability of the master and of the owner. Priority is given over all other liens, and they are treated with the most liberal favor. In *The Mary, 1 Paine*, 183, LIVINGSTON, J., says: “Few claims are more highly favored and protected by law than those for seamen's wages. They are hardly earned, and liable to many contingencies, by which they may be entirely lost, without any fault on their part. When they become due, the vessel, own-

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The Galloway C. Morris.

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ers, and master, are generally all responsible until satisfaction be obtained. The liability of a vessel for wages may be considered as the law of every commercial nation. They take precedence of bottomry bonds, and in the language of Sir WILLIAM SCOTT, they are "sacred liens, and as long as a plank remains, the sailor is entitled as against all other persons to the proceeds as a security for his wages."

These are familiar principles of maritime law, and they are restated here only to indicate the footing of preference, on which claims like the one in suit are placed, and the indulgent liberality with which courts ought to deal with them.

The libelant in this case has proceeded *in rem* against the schooner Galloway C. Morris, to recover his wages, as cook and steward, during several coast-wise voyages, beginning about January 28, 1868, and ending October 28, 1869, which were prosecuted under William Artis, as master. His service was continuous during the whole of the period within these dates, but he now claims his stipulated compensation for the time only when Artis was in command, allowing credit for different payments made to him.

The amount of his claim is but feebly contested, but his recovery is resisted on two grounds:—

1. That he agreed to release the vessel and its owners, and look to the master alone for his compensation.

2. That his claim is stale, and its lien upon the vessel has therefore been lost.

Of the first defense, it is sufficient to say that it is without any foothold by which it can stand. It rests upon the assumed effect of a receipt given by the libelant to John Clendeniel, the ship's husband, on September 7, 1869. He was then entitled to forty-two dollars and fifty cents for current service on a single trip of the vessel, and although he then asserted his claim to a

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The Galloway C. Morria.

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larger sum for arrears of wages, he was refused payment for what was confessedly due him, unless he "would sign a receipt in full against the schooner and her owners, and look to Captain Artis for the balance." Under such circumstances the receipt is good only for the sum actually paid to the libellant. A court of justice will not sanction or enforce a concession which has no other consideration than a refusal to pay a debt confessedly just and owing.

The second ground has been more earnestly pressed, and therefore demands a fuller notice.

Staleness is not susceptible of a precise definition of uniform application. It is predicable of the peculiar circumstances of each particular case. It does not operate to discharge the debt, but to deny to the creditor the enforcement of some security or form of liability, which the law holds him to have lost by laches. Simple forbearance does not constitute it; but the reason on which it rests is, that the creditor has unreasonably delayed the collection of his debt, so that some special equity or interest would be injuriously affected by the allowance of his claim. Hence it is, that it has been generally, if not always, interposed to protect a purchaser of a vessel, or a person having a like equity, against the lien of debts previously existing, the collection of which had been so long delayed as to justify a presumption that they had been paid, or at least, that the privileged hypothecation of the vessel for their security had been waived. "If a claim of this kind be not seasonably prosecuted, and the vessel become the property of another for a fair consideration and without notice, it seems reasonable that those who have been negligent should suffer, and not an innocent purchaser. Some rule of this kind appears the more necessary in a case where it is so difficult, if not impossible, to ascertain either the existence or the extent of demands of this nature. But however reasonable

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The Galloway C. Morris

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such a rule may appear, none has yet been adopted, either in England or this country, which requires a seaman to assert his lien in any given time, or which will justify the court in saying, that if he does not proceed by libel the very first opportunity which is afforded him, he shall forfeit all right of obtaining satisfaction in that way, unless the vessel shall still belong to the same person." *The Mary*, 1 *Paine*, 183. And in *The Bolivar*, *Olc.* 477, Judge BETTS says: "By the marine law there is no fixed period of time within which mariners must proceed to enforce their lien for wages; yet such lien will become extinct or barred by unreasonable delay, if the vessel passes into the hands of a *bona fide* purchaser ignorant of such a claim." 3 *Kent Com.* 196. Judge WARE remarks: "It is not doubted that a seaman may lose his lien by lying by for a length of time, and suffering the vessel to be sold to a person ignorant of his claim, without giving him notice." *The Eastern Star*, *Ware*, 184.

It is certainly in harmony with the doctrine of all the cases referred to, to hold that, in a case when the ownership of the vessel has not been changed, and no appreciable injury has resulted to the owner, forbearance by a seaman to demand and collect his wages, will not be attended by a loss of his specific remedy against the vessel.

In this case the beginning of the service for which the libellant seeks compensation, is not more than about twenty-one months before the filing of his libel, November 2, 1869, and this service was rendered in different voyages along the coast of the United States, down to October 28, 1869, when he was discharged. The ownership of the vessel was substantially unchanged, and nearly every one of the libellant's voyages was begun or ended at Philadelphia, where the ship's husband and most of her owners resided, and the ship's papers were easily accessible to any of them.

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The Galloway C. Morris.

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We are unable, under such circumstances, to say that the owners have any equity, which ought to subject the libelant to a forfeiture of his lien upon the vessel, and to the probable loss of his just wages, by reason of his pecuniary inability to pursue another remedy for them.

It is urged, however, that the ship was sailed on shares, and that the libelant's forbearance has operated injuriously to the owners. It is too well settled to admit of controversy, that the lien of seamen for their wages is not affected by a contract between the master and owners in reference to the sailing of the vessel. 1 *Sprague*, 440 ; *Daveis*, 392. The only aspect in which such a contract can be considered here, is as a reason for requiring greater promptitude on the part of the seaman in prosecuting his claim for wages, than it might otherwise be his duty to observe. Where, however, the owners had frequent opportunities, by examination of the ship's muniments, to ascertain the posture of the libelant's claim ; where demand was actually made upon them for its payment a month before his discharge ; where it does not appear that any settlement with the master, upon the supposition that these wages had been paid, was made, it is difficult to see how, in any aspect, such a contract can be used to affect the libelant.

In our judgment, the libelant is entitled to recover his wages, as stated in the schedule exhibited with his libel, to wit, five hundred and forty-nine dollars and seventeen cents, with interest from the filing thereof, and with his costs to be taxed, and a decree will accordingly be entered therefor.

## UNITED STATES v. PRESCOTT.

*District Court; District of Wisconsin, 1870.*

## BANKRUPTCY.—INDICTMENTS.

In an indictment under section 44 of the Bankrupt Act of 1867, it is not sufficient, either as to the proceedings or the jurisdiction of the court in bankruptcy, to rely merely upon a general averment. All matters necessary to constitute the offense as defined by the act must be pleaded.

The description of the goods, in an indictment under the act, should be as definite as in a declaration in trover.

The word *feloniously* should be omitted in indictments under the act.

The offenses made indictable are misdemeanors.

In drawing indictments, figures should not be used for dates.

Drawing indictments under the Bankrupt Act of 1867,—explained.

## Motion to quash an indictment.

The defendant was indicted under section 44 of the Bankrupt Act, for fraudulently obtaining goods on credit; and now moved to quash the indictment upon grounds which appear in the opinion.

*James G. Jenkins*, for the motion.

*G. W. Hazleton*, District-Attorney, opposed.

MILLER, D. J.—The first count of the indictment charges that on a certain day mentioned, in the district court of the United States for the District of Wisconsin, under and pursuant to an act of Congress, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, proceedings in bankruptcy were duly commenced against

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United States v. Prescott.

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Alphonso Prescott, Leander F. Snyder, and R. H. Lovell (whose full Christian name is to the said grand inquest unknown), as insolvent debtors, and partners under the name of Prescott, Snyder, and Lovell, who thereupon afterwards, to wit, on a certain day mentioned, were adjudged bankrupts; that prior to the dates last aforesaid, and within three months before the commencement of said proceedings in bankruptcy, to wit, on August 16, 1869, within the jurisdiction of this court, and at and in the District of Wisconsin, the said Alphonso Prescott, Leander F. Snyder, and R. H. Lovell, then and there representing themselves to be associated together as copartners, under the firm of Prescott, Snyder, and Lovell, and holding themselves out as wholesale merchants, and jobbers of boots and shoes, under the false color and pretense of carrying on business and dealing in the ordinary course of trade of wholesale boot and shoe merchants and jobbers, did then and there wrongfully, unlawfully, and feloniously obtain on credit, from one Lyman Dike, certain goods and chattels, to wit, a large quantity of boots and shoes, of the value of five thousand dollars, with the intent then and there, by the obtaining of said goods and chattels, to defraud the said Lyman Dike, contrary to the statute of the United States in such case made and provided, and against the peace and dignity of the United States of America.

There are other like counts of the indictment, except as to the names of persons from whom goods had been obtained by defendants.

It is alleged in the motion to quash the indictment that it is defective in not setting forth the manner in which the proceedings in bankruptcy were commenced, and also in the description of the goods, &c.

The court exercises jurisdiction in bankruptcy as limited by the act; and proceedings must be commenced and prosecuted substantially as the act directs.

Neither as to the proceedings nor the jurisdiction of the court in bankruptcy, is it sufficient in an indictment under the act to rely merely upon a general averment. All matters necessary to constitute the offense must be pleaded. It is not sufficient, as in this indictment, to aver that proceedings in bankruptcy were duly commenced. It must be pleaded and proven in order to convict, that a petition in bankruptcy was presented to the district court by a certain creditor, naming him, and also the amount of the debt of such petitioning creditor, and the alleged cause of bankruptcy, and the adjudication of bankruptcy. It must appear affirmatively that the creditor had a right under the law to prosecute proceedings in bankruptcy. The amount of his debt must appear, otherwise the court would have no jurisdiction.

Of the bankrupt consolidated act of 12 and 13 *Victoria*, section 44 of the act under which the indictment in question was framed, is almost a literal copy. Several decisions of courts in England, as to requirements in the prosecution and trial of indictments under their act, were made and published before the passage by Congress of our bankrupt act, and to which I refer as proper for consideration. *Regina v. Lands*, 33 *Eng. Law & Eq.* 536; *Regina v. Ewington*, 41 *Eng. Com. Law*, 178; *King v. Jones*, 24 *Id.* 156. It must appear that the bankrupt obtained goods within three months of the bankruptcy, by means of a representation which he knew to be false, that he was carrying on business and dealing in the ordinary course of trade, and such representations must be actually made by him. *Regina v. Boyd*, 5 *Cox*, 502.

The description of the goods obtained by defendants is too uncertain; instead of a large quantity of boots and shoes, a certain number of pairs of boots and also of shoes, or a certain number of packages in boxes of boots and also of shoes, should be described. This

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could be ascertained from the bills of sale. The description of the goods in an indictment should be as definite as in a declaration in trover.

The word feloniously should be omitted in indictments under the act. The offenses made indictable are misdemeanors. And in drawing indictments, figures for dates should not be used.

This being the first indictment in this court under the Bankrupt Act, I have prepared this opinion as a guide to the district-attorney in future.

The indictment will be quashed.

Order accordingly.

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THE JOHN MARTIN.

*District Court; Eastern District of Michigan, April T., 1870.*

SEAMEN.—DESERTION.—FORFEITURE OF WAGES.

- A tug-boat was engaged in towing vessels between Lake Erie and Lake Huron. During a trip, when the tug was off Detroit, the engineer, who was verbally hired by the month, and whose time was not up, demanded to be landed at that place, saying he had a better offer. The master refused, whereupon the engineer left his post of duty and did not return to it. Upon the return of the tug he was put ashore at Detroit. *Held*, that this was a case of desertion, and that the engineer by his conduct had forfeited all wages due to him.
- A tug, engaged in towing vessels between Lake Erie and Lake Huron, is not a vessel bound to "a port in any other than an adjoining State," or to "any foreign port," within the meaning of section 5 of the act of 1790, 1 *Stat. at L.* 133,—prescribing the kind of contract to be entered into between master and mariner.

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The term "voyage," as applied to vessels engaged in foreign and inter-State commerce within the meaning of the maritime law, is not applicable to a tug, making short trips from one body of water to another.

Section 5 of the act of 1790, 1 *Stat. at L.* 133, and section 25 of the act of 1856, 11 *Id.* 62,—relating to the desertion of mariners,—must be construed together as statutes *in pari materia*. They do not repeal the maritime law of desertion.

An offer by an engineer, who has disobeyed orders and deserted, made five or six weeks after such desertion, to return, is not made within a reasonable time.

Where the statutory penalty for desertion is invoked, there must be statutory proof; otherwise it is not required.

Hearing upon a libel in admiralty.

This was a libel *in rem*, for wages.

The libel alleged that the libelant was hired and shipped in March, 1868, to serve as engineer on board the tug for one hundred dollars per month wages; that he entered into such service on March 16, 1868, and served until September 23, of the same year, and claims a balance due of one hundred and twenty-nine dollars and ninety-six cents.

The answer of William Livingstone, Junior, and other claimants, admitted the employment of libelant "on board of said tug as engineer, and at the rate of one hundred dollars per month, as alleged in the first article of said libel;" alleged that the agreement of libelant was to serve the entire season of navigation of 1868; denied that libelant well and faithfully performed his duty on board the tug; and denied also that there is due to libelant the balance claimed, or any sum whatever.

The answer further alleged disobedience by the libelant of the lawful commands of the master of the tug, and desertion; and claimed damages in loss of time and business in consequence of such disobedience and desertion, in the sum of two hundred dollars, and in

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the further sum of two hundred and fifty dollars for injuries to the engine of the tug, occasioned by the incompetency of the engineer the owners were obliged to employ for want of a competent one at hand or within their reach to take the place of libellant.

*Mr. A. Russell*, for the libellant.

*Messrs. Moore & Griffin*, for the claimants.

LONGYEAR, J.—The proofs as to what the contract was, and in relation to the time of actual service, entirely agree as to the wages per month, and as to when the service commenced and when it ended, and entirely accord with the allegations in the libel. As to what the contract was in relation to the terms of service, whether it was a simple hiring at one hundred dollars per month, indefinite as to the length of time it was to continue, or whether it was a part of the agreement that the libellant should serve the entire season of navigation, as alleged in the answer, the testimony is contradictory.

The proofs upon this point stand entirely upon the unsupported testimony of William Livingstone, Jr., one of the claimants, on the one side, and of the libellant, on the other. Neither is corroborated, and as both stand before the court on an equal footing as to interest and credibility, the testimony of the one exactly balances that of the other. This allegation, therefore, as to length of time libellant was to serve, is not made out, and the contract must stand as set up in the libel: viz: a hiring at one hundred dollars per month, indefinite as to time of service beyond what those terms signify. Those terms signify: 1. A hiring for one month at least. 2. If the service is continued beyond the month without any new agreement, it will be implied that it is at the same wages, and of course for another

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complete month, and so on from month to month. Such, then, was the agreement.

Under this agreement, libelant served from March 16, 1868, to September 23, 1868, both days inclusive, five months and eight days, which, at one hundred dollars per month, amounts to six hundred and twenty-six dollars and sixty-six cents. Libelant acknowledges the receipt of five hundred and ten dollars, which leaves a balance of one hundred and sixteen dollars and sixty-six cents, which amount, with interest from September 23, 1868, to date of decree, the libelant is entitled to recover, unless he is debarred of the same by the matters set up and proven by the respondents.

It appears in the proofs that the tug did not go into commission until April 21, 1868, a month and six days after the service of libelant commenced; and it is claimed that for that time libelant has no lien for his wages, his claim, if any, being against the owners in person, and not against the tug. There is no allegation in the answer on which to found this claim, and it must therefore be disregarded.

In this view of the question, it is of course unnecessary to consider what would have been its effect if it had been set up. The defense set up is forfeiture of wages, in consequence of disobedience of orders and desertion.

It appears that the tug was engaged in towing vessels between Lakes Erie and Huron, and that on September 23, 1868, as the tug was coming down with a tow from Lake Huron, on its way to Lake Erie, as she was approaching Detroit, and some two or three miles distant, libelant came to the master, and asked him if he was going to stop at Detroit, and said he had to get off there, as he had had a better offer. On being told by the master that he should not stop at Detroit, libelant said the boat should not pass Detroit; that he would

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stop the engine ; but did not carry his threat into execution. He and the master had some words. The master called the mate and one of the men as witnesses, and said to libelant, "I want the boat to go through to Lake Erie—stop her at your peril." Then libelant went to his room, and the tug went on with its tow to Lake Erie, the second engineer working the engine. Did not stop at Lake Erie to look for a tow, but came back light, on account of the difficulty with libelant, and landed him at Detroit. Another engineer was found and employed within two or three hours, and the tug went on to Lake Huron, and the next day procured a tow down.

Libelant testifies that one reason of his leaving was, that from March to September he had no change of bed-clothes, and the tug was an old boat.

The master and owner both testify, that they never before heard any fault found by libelant with his bed or board on the tug. The only reason he gave for quitting was that he had a better job.

Livingstone testifies that libelant came to him for his pay twice—once next day after he quit, and once some five or six weeks afterwards, and was refused on both occasions, for the reason that he quit as he did.

Libelant testifies that when he went for his pay, and was refused, he offered to return to the boat, but does not state on which occasion.

Livingstone says it was on the second occasion, and after libelant had lost the situation he left the tug to obtain.

Up to the time libelant demanded to be put ashore at Detroit, as above stated, he had always obeyed orders and performed his duties well. The earnings of the tug about that time were about one hundred and fifty dollars per day.

No shipping articles were signed by libelant, and the agreement was not in writing ; no entry of the de-

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sertion was made upon the log-book or list of the crew, nor were any of the statutory formalities observed; and therefore the defense of deserting must be made out, if at all, under the maritime law, independent of the statutes upon the subject.

It is claimed, on behalf of libelant, that desertion is a statutory offense, and can be proved only in the manner and form prescribed by statute; or in other words, that the statutes upon this subject have by implication repealed the maritime law of desertion.

In regard to repeal of laws by implication, the rule is this: that a general statute, without an express repealing clause, will not repeal an existing law upon the same subject, unless the two are irreconcilably inconsistent. The leaning of courts is against the doctrine. The two laws will be reconciled, if possible, so that both may stand. *Sedgw. Stat. & Cons. Law*, 123, 126.

Now, by the maritime law, briefly stated, desertion, to work a forfeiture of wages, must be not only an absence without leave, or in disobedience of orders, but with the intention not to return—to abandon the vessel and the service. *Cloutman v. Tunison*, 1 *Sumn.* 373, 375, 376; 1 *Conk. Adm.* 129.

By the statute (Act of 1790, 1 *Stat. at L.* 133, § 5), a forfeiture of wages is worked by an absence without leave for forty-eight hours at one time, whether it was with or without the intention to return. The statute also imposes additional penalties, viz: forfeiture of the seaman's goods and chattels, and payment of damages.

There is no inconsistency in these two laws. By both, the absence must be without leave, and all antecedent wages and advances are forfeited. If the intention not to return exists, and forfeiture of wages alone is sought, then the maritime law is sufficient, and may be resorted to; but if such intention cannot be shown, and an absence of forty-eight hours at one time can be; or if a forfeiture of goods and chattels and payment of

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damages is sought in addition to forfeiture of wages, then a statutory desertion must be made out; or, in other words, there is both a statute desertion and desertion by the maritime law. If the former is relied on, then the statutory proof must be made; otherwise, not.

It is true that the contrary doctrine was held for a number of years by some of the Federal courts, particularly by the district courts for the Southern District of New York and Eastern District of Pennsylvania, as appears by the cases cited by the learned counsel for libellant, and other cases. See *The Cadmus*, *Blatchf. & H.* 139; *The Martha*, *Id.* 151; *The Elizabeth Frith*, *Id.* 195; *The Union*, *Id.* 545, 555, 556. Also *Wood v. The Nimrod*, *Gilp.* 83; *Snell v. The Independence*, *Id.* 140; *Knagg v. Goldsmith*, *Id.* 207.

I think it will be found that nearly, if not quite all the decisions upon the point, hold the doctrine here contended for, and even Judge BETTS, who made the decisions above cited from *Blatchf. & H.*, some ten years after the last of those decisions was made, came around squarely upon this doctrine, and in the case of *The Osceola*, *Olc.* 461, made use of the following language: "The statutory evidence is necessary to convict a seaman of a desertion which carries a forfeiture of wages when not shown to be willful, and with intention not to return to the vessel. The desertion punished as an offense by the maritime law, is defined in the same terms, and established by the same process, as it was prior to the act of July 20, 1790." And I think it may be considered the established doctrine, by authority as well as on principle, that the act of 1790 did not repeal the maritime law of desertion. See *2 Pars. Ship. & Adm.* 102, 103, note 2; *1 Conk. Adm.* 129, 131; *3 Kent Com.* 198; *Cloutman v. Tunison*, *1 Sumn.* 373, 380; *Coffin v. Jenkins*, *3 Story*, 188; *The Cadmus v. Matthews*, *2 Paine C. Ct.* 229; *The Union v. Jansen*,

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*Id.* 277; *Barton v. Salter*, 21 *Law Rep.* 148; *The Ro-vena, Ware*, 309; *Piehl v. Balchen, Olc.* 33; *The Swallow, Id.* 10; *The Crusader, Ware*, 437, 447; *The Regulus*, 1 *Pet. Adm.* 212.

But there is another fatal objection to the proposition under consideration as applicable to the present case. The seamen or mariners who are liable to the statutory forfeiture are described in section 5 of the act of 1790 as follows: "Any seaman or mariner who shall have subscribed such contract as is hereinbefore described."

The cases in which such contract is required, and the nature of the contract, are prescribed in the first sentences of the act, in the following words: "Every master or commander of any ship or vessel bound from a port of the United States to any foreign port, or of any ship or vessel of the burden of fifty tons or upward, bound from a port in one State to a port in any other than an adjoining State, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on board such ship or vessel, . . . declaring the voyage or voyages, term or terms of time for which such seaman or mariner shall be shipped."

Now in this case, the vessel is a tug, engaged in towing vessels between Lakes Erie and Huron, through the Detroit and St. Clair rivers, and over the St. Clair flats. She was from the port of Detroit, in the State of Michigan, but was not bound to "any foreign port," and although a vessel of upwards of fifty tons burden, she was not bound to a "port in any other than an adjoining State." She, in fact, was not bound to any port whatever. Her destination and employment was almost exclusively out upon the open water. It is true, in the prosecution of her occupation, she might and might not run into Canadian waters, or stop at points on the Canadian shore for wood or other supplies, as it is

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shown that she did at Malden, on September 23, on her way back from Lake Erie to Detroit, but clearly this does not bring her within the description of vessels to which the statute is intended to apply. It is said that she also frequently ran into waters and sometimes took her tows into ports in the State of Ohio; but Ohio is an adjoining State, and therefore not within the statute.

The statute was intended to apply to vessels engaged in foreign commerce, and inter-State commerce, other than between adjoining States, and of course not to a case of this kind. See *The B. F. Bruce*, 1 *Newb.* 539. The act of 1856 (11 *Stat. at L.* 62, § 25), must be construed together with the act of 1790, *in pari materia*, and as constituting part and parcel of the same general system, and therefore the remarks above made in relation to the act of 1790 will apply with equal force to that of 1856. Was there, then, a desertion by libellant, within the meaning of the maritime law? As we have already seen, absence from the vessel without leave, and with the intention not to return, are essential elements, although not all the elements of the offense. That these elements existed in this case I think is clearly made out by the proofs. It cannot be said that because the master brought libellant to Detroit, and put him ashore, that therefore libellant did not quit without leave. It clearly appears that the master was compelled to do this in consequence of the conduct of the libellant, and in order to enable him to continue the prosecution of the business of the tug. Beginning with the demand of libellant when approaching Detroit, to be put ashore, followed as it was by his quitting his post and going to his room, leaving the engine to be worked by his second, or not at all, and his refusal to stay and work the engine at Lake Erie till the tug could pick up a tow and bring it back, thus compelling the master, against his will, to abandon

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the enterprise and put back into the home port to obtain an engineer, and libelant's finally leaving the vessel at Detroit to accept an engagement, as he said, upon another vessel, constituted but one act, and that act is clearly desertion, so far as absence without leave, with intention not to return, is essential to make out the offense.

But it is said that desertion can only take place during a voyage. This is no doubt correct as a general rule. The term "voyage," however, as applied to vessels engaged in foreign and inter-State commerce within the meaning of the maritime law, is clearly inapplicable to a tug, making short trips, generally not from port to port, but from one body of water to another, merely furnishing the motive power to other vessels themselves bound on a voyage, not taking on freight at one port and delivering it at another, but picking up its burdens upon the water, and wherever its aid is invoked, and dropping them again upon the water. It would be a misnomer to apply the term "voyage" in the sense of the maritime law to such trips.

The reason of the rule that desertion can take place only during a voyage, applied to a case like the one under consideration, results in this: that desertion can take place only during the term of service agreed upon, whether that be for the entire season of navigation, or for specified time.

But, as applied to the facts in this case, it can make no difference whether a trip is regarded as a voyage or not, because, in view of the position above assumed, that the entire conduct of libelant, commencing with his demand to be put ashore at Detroit, and ending with his leaving the vessel, was but one act of desertion, the desertion did take place during a trip or voyage, if we choose so to call it.

Notwithstanding all this, however, if libelant had,

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as is contended in his behalf, a legal right to terminate his engagement at any moment, and consequently to make the demand he did, and to enforce it as he did, then of course there was no desertion.

As we have already seen, the hiring was by the month, and libellant left at the end of eight days of the month in which he left. An agreement to pay by the month cannot be construed into an agreement to pay by any less period.

The monthly service and the monthly wages are indivisible, and both by the admiralty and the common law, if the service is abandoned during the month without justifiable cause the obligation to pay for past services is destroyed.

The common law courts, after a long contest have, however, somewhat ameliorated this rule, so that they will now allow a recovery for what the services are actually worth, not beyond the contract price, subject to a set-off or recoupment for damages resulting from the non-performance.

Libellant has not chosen to adopt this course, however, but has chosen to arrest the vessel in a court of admiralty, and submit his rights to be decided on the principles of the admiralty law, and the owners insist that the rights shall be determined by the strict rules of that law. By that law, libellant had no right to leave till the end of the month, without justifiable cause. See *The Swallow*, *Olc.* 4, 10, 11.

Had he such cause? He says one reason of his leaving was, that his bed was not changed during the whole six months and upwards that he was on the tug, and the tug was an old boat; but he made no complaint of that kind during the whole six months. He did not give these as reasons for leaving, but gave another and a different reason at the time he left; and he did not mention it in his testimony as first given, although he was asked his reasons for leaving. I cannot believe,

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therefore, that even if the facts sworn to by him existed, they constituted any part of the cause of his leaving. It may be said that the hiring being by the month, libelant will forfeit only his wages for the month in which he left. A moment's reflection will show the unsoundness of the position. The hiring being by the month, either party could terminate the contract at the end of any month; but until it was so terminated, the service was by virtue of the original agreement, and was one entire thing.

But it is claimed that libelant offered to return to the vessel and resume his position as engineer. An offer to return within a reasonable time, and before the place has been filled by another, will, as a general rule, avoid the forfeiture. See 2 *Pars. Shipp. & Adm.* 99, and cases cited in *Nolen*, 4, 6; also, *The Philadelphia, Olc.* 219.

Libelant testifies that when he called on the owners for his pay and was refused, he offered to return, but he does not state when this occurred.

Livingstone, one of the owners, testifies that libelant called twice for his pay—once the next day after he left, and again some five or six weeks after—and that it was upon the last occasion that he offered to return. As this is not inconsistent with libelant's statement, it must be taken to be the truth. This was not within a reasonable time, and another engineer had been engaged, and was then occupying the position. The forfeiture was, therefore, not avoided by the offer to return.

It is true the kind of service under consideration does not call for the same rigorous application of the law as ocean service, because there the consequences of desertion may be vastly more serious. The court may in its discretion alleviate the rigors of the general rule, and in view of mitigating circumstances, may impose a less penalty than that of entire forfeiture of wages. But I fail to see any mitigating circumstances

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in this case. They are, rather, of an aggravated character. When the tug is in the midst of a trip, with several vessels in tow, and at a point and at a time when it might and probably would cause the tug to be mulcted in damage, and the loss of the towage, if she should stop to look up another engineer, this man, without any previous notice, and without any cause other than to accomplish his own advantage, suddenly proposes to leave the vessel, and demands that the tug shall stop and put him ashore; and to enforce his demand, defiantly threatens to stop the engine; and when he is overawed from doing this by the orders and counter-threats of the master, he goes to his room, and refuses to, or at least does not further discharge his duties, and thus compels the master to return and put him ashore.

This seems to me a case truly in which the law should be rigorously applied.

A decree must be entered dismissing the libel, and for costs to claimants, to be taxed.

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STANWOOD v. GREEN.

*District Court; Southern District of Mississippi,  
June T., 1870.*

INTERNAL REVENUE.—POWERS OF SUPERVISORS.

A supervisor of internal revenue is entitled, under the provisions of the internal revenue act of July 20, 1868, § 49, 15 *Stat. at L.* 144, to examine the books and papers belonging to banks, bankers, bro-

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kers, and banking associations, and is not bound to inform the owners of his purpose in making such examination.

Where a summons for the production of books has been issued by the supervisor of internal revenue, and such summons has been duly executed, but not complied with, a United States district judge may, upon application, and proof of these facts, issue a writ of attachment.

Section 49 of the act of July 20, 1868, 15 *Stat at L.* 144,—which gives supervisors of internal revenue the right to examine such books and papers as show the operation of banks, &c., with the public, and are connected with the internal revenue of the United States,—is not unconstitutional, either as purporting to authorize an unreasonable seizure and search, or as compelling a party to testify against himself.

Motion to quash an attachment.

HILL, J.—The questions now presented arise upon the following proceedings:

The applicant being the supervisor of internal revenue for the States of Alabama and Mississippi, called at the banking house of Messrs. J. & T. Green, and requested to see the checks received by them as such bankers on the previous day, which the Messrs. Green refused to exhibit; insisting that the supervisor, under the acts of Congress, possesses no such right; and that, were such the provision of the act, it would be in violation of the constitution of the United States, and of no effect; whereupon the supervisor issued his summons directed to the Messrs. Green, requiring them to produce before him, at his office in Jackson, all books of accounts and papers containing entries of accounts between the banking house of said J. & T. Green and all other persons; which summons was duly executed, but which was not complied with. Whereupon application was made to me for a writ of attachment to compel said bankers to produce said books and papers; and upon proof of the execution of said summons, and the non-compliance therewith, the attachment was issued, and

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the said bankers appeared at the return thereof; and, by counsel, moved to quash the proceedings for the following reasons:

1. That the application showed no facts under the acts of Congress giving to the district judge jurisdiction to entertain this proceeding.

2. That if the facts as stated were sufficient under the acts of Congress to authorize this proceeding upon the part of the supervisor and judge, such legislative act would be repugnant to the Constitution of the United States, and void.

The first question for consideration is, what power and authority does the act approved July 20, 1868, confer upon the supervisor in relation to the examination of books and papers of a private banker? The act approved June 30, 1864, provides that banks chartered or organized under a general law, with a capital not exceeding the sum of fifty thousand dollars, and bankers using or employing a capital not exceeding fifty thousand dollars, shall pay a tax of one hundred dollars; when using or employing a capital exceeding fifty thousand dollars, for every one thousand dollars in excess of fifty thousand dollars, the sum of two dollars. Every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or a banker.

Section 110 of the same act provides that there shall be levied, collected, and paid a tax of one-twenty-fourth of one per cent. each month upon the average amount of deposits of money subject to payment by check or draft, or represented by certificates of deposit, whether payable on demand or at a future day, with

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any person, bank, association, company, or corporation engaged in the business of banking; and a tax of one-twenty-fourth of one per cent. per month, as aforesaid, upon the capital of any bank, association, company, or corporation, and on the capital employed by any person in the business of banking, beyond the average amount invested in United States bonds; and further provides for making monthly returns, and the payment of such taxes, imposts, penalties, &c.

Section 99 of the same act further provides that there shall be paid on all sales made by brokers, banks, or bankers, whether for the benefit of others or on their own account, the following taxes, that is to say: Upon all sales, or contracts for the sale of stocks, bonds, gold and silver bullion and coin, promissory notes or other securities, a tax of one cent for every hundred dollars of the amount of such sales or contracts, &c. The act further provides that, in all such sales, or contracts of sales, there shall be made and delivered by the seller to the buyer, a bill or memorandum of such sale or contract, on which there shall be affixed a lawful stamp or stamps, in value equal to the amount of tax on such sale, to be determined by the rates of tax before mentioned; and other provisions in relation to such tax, stamps, and penalties for non-compliance and violation, which need not be here stated.

From the above provisions of the internal revenue laws it will be seen that a very considerable revenue is imposed upon these banking associations, and persons engaged in banking, and various duties are imposed thereon. And to determine what taxes should be paid, the books and papers belonging to such banks and banking associations should be shown.

By reference to the act approved July 20, 1868, imposing taxes on spirituous liquors and tobacco, and for other purposes, it will be found that by section 49 of the act, after providing for the appointment of a super-

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visor of internal revenue, it is further provided that it shall be the duty of the supervisor, under the direction of the commissioner, to see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with ; to aid in the prevention, detection, and punishment of any frauds in relation thereto ; and to examine into the efficiency and conduct of all officers of internal revenue within his district ; and for such purposes he shall have the power to examine all persons, books, papers, accounts, and premises, and to administer oaths, and to summon any person to produce books and papers and to appear and testify before him, and compel a compliance with such summons in the same manner as assessors may do, &c.

That there exists a necessity for taxation, and to a very large amount, is not denied. That the amount, the subjects of taxation, and the mode of assessing and collecting the same, are questions alone to be determined by Congress, the law-making power, and with which the courts have nothing to do, it being their duty to expound and enforce the laws, is also admitted. It was competent for Congress to provide for the appointment of such officers as might be deemed necessary for the collection of the revenue, and to prescribe their duty. The act stated has provided for the appointment of a supervisor, and has prescribed his duties : 1. To see that the laws for the collection of internal revenue are faithfully executed and complied with. 2. To aid in the prevention and punishment of frauds in relation thereto. 3. To examine into the efficiency and conduct of the revenue officers of his district. And to enable him to perform any one or all of these duties he is invested with these extraordinary powers, as they are termed without which he would be unable to perform the duty assigned him.

It is contended by the counsel of the Messrs. Green

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that this power is only to be executed in the same cases, and in the same way that assessors may do under the act of 1866. This is a mistake ; the powers are of a different character altogether ; it is only when the summons is not complied with that obedience thereto is to be enforced as provided for in the case of non-compliance with the summons issued by assessors, which is to apply for an attachment to the district judge of the district, or to a commissioner of the circuit court of the United States.

It is contended that before the Messrs. Green were under any obligation to produce their books and papers the supervisor was bound to inform them of his purpose in the inspection. This he was not bound to do ; for such a disclosure might have defeated the very object of the examination. It might have been to reach a defaulting or fraudulent officer, or other person committing frauds on the revenue, who might thereby have been notified of such proceedings against him, and made his escape, or covered up his fraud.

Without further comment, I am satisfied that the supervisor is entitled under the law to the examination sought, and to this mode of procuring it ; which brings us to the last proposition, and that is, the repugnance of these acts of Congress to the Constitution.

It is said that this is an attempt at an unreasonable seizure and search into the private affairs of the citizens, against which they are protected by the Constitution. There is no attempt to investigate any of the private affairs of the Messrs. Green, only an examination into so much of their business as relates to the operations of their banking house is and connected with the subjects of taxation ; beyond this, he has no right to institute an inquiry. Although the Messrs. Green are not operating under a charter, they are nevertheless doing business with the public as bankers. If doing a business legitimately,—and there is no charge that they

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are not, nor is it necessary, as we have seen, that there should be, to support this inquiry,—no injury can result to them from an inspection of their books and papers connected with this public business, in which the United States has an interest in the collection of the revenue imposed. I am satisfied that it is not an invasion of any of the rights secured under the Constitution.

But it is contended that it is in violation of that portion of the Constitution which protects parties against being compelled to testify against themselves. If the provision of the Constitution protecting parties against being compelled to produce such papers and documents as may tend to subject them to a criminal prosecution applies in this case, they are relieved from such liability by the provisions of the act of Congress approved February 25, 1868, 15 *Stat. at L.* 37, which was intended to enable the government, through its officers, to detect and punish frauds by obtaining evidence from those otherwise protected under this provision of the Constitution.

The unconstitutionality of the act conferring the power has been pressed by counsel with unusual ability and zeal, but he has failed to convince my mind of its correctness. It was competent for Congress to provide the mode by which compliance with the demand for an inspection of such books or documents, as well as the testimony of witnesses, might be enforced, and it has adopted the measures stated in the act ; referring it to the judge of the district, in whom judicial power is vested, to determine the rights of the parties and to enforce obedience to the laws ; and has not left it to the supervisor to be the judge of the extent of his powers in such cases. If the Messrs. Green were of the opinion, as they, I am satisfied, were, that this demand upon them was not authorized by law, it was their right to refuse compliance until the question should be deter-

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mined by the proper tribunal, and in the mode prescribed by law, and their non-production of their books and papers, under the circumstances, is by no means to be taken as a suspicion of their having been guilty of any omission, or any violation of law ; for no man, however correct in his business, would be willing to have his affairs pried into by those having no legal authority to do so. And it is not to be presumed that the supervisor would desire to inquire into the private affairs of citizens for any other purpose than those connected with his official duties. To settle the legal rights of both parties without reflection on either, this case has been brought before me ; and coming to the conclusion I have, I feel constrained to overrule the motion to quash the proceedings, and unless other proceedings are proposed, the Messrs. Green will be directed to produce such books and papers as the supervisor may desire to examine, connected with their banking operations ; it being understood that this right upon the part of the supervisor extends only to such books and papers as relate to their banking operations, and are connected with the internal revenue of the United States.

Order accordingly.

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United States v. A Distillery in West-Front-street.

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UNITED STATES v. A DISTILLERY IN WEST-FRONT-STREET.

*District Court; District of Delaware, 1870.*

REVENUE LAWS.—VALIDITY OF PROVISIONS IMPOSING FORFEITURE.

An act of Congress,—such as section 44 of the act of July 20, 1868, 15 *Stat. at L.* 142, which declares that real property employed in a violation of a revenue law shall be forfeited therefor,—is not unconstitutional. Such an act may be sustained as a regulation of civil policy appropriate to accomplish a purpose vital to government.

Libel of information to enforce a forfeiture.

HALL, J.—This is a case of libel of information on behalf of the United States *in rem*; that is to say, a distillery, being a brick building, 106 West-Front-street, Wilmington, and the lot of land on which the said distillery stands, and certain apparatus, &c., which John S. Prettyman, U. S. collector of internal revenue for this district, had seized as forfeited to the United States, according to section 44 of the act of Congress “imposing taxes on distilled spirits,” &c., of July 20, 1868.

The libel of information alleges that Archibald McKinley, being a person distilling spirits, on the — day of —, 1869, at the distillery aforesaid, did carry on the business of a distiller, with intent to defraud the United States of a part of the tax on the spirits distilled by him, contrary to section 44 aforesaid, and that Philip Plunket had right, title, and interest in the said lot of land on which the said distillery is situated, and did knowingly suffer and permit the business of a dis-

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tiller to be carried on by the said Archibald McKinley, at the said distillery.

Archibald McKinley and Philip Plunket have appeared and claimed the property, and answered the information severally; Philip Plunket claiming the real estate (the distillery and lot of land on which it is situated, in which he says he has an estate in fee simple). The answer put in issue all the allegations in the libel of information. On trial before a jury, a general verdict has been found for the plaintiff.

It is thus established that Archibald McKinley, a distiller, did carry on the business of a distiller at the distillery before mentioned, situated on the afore-mentioned lot of land; that Philip Plunket had a right, title, and interest in the said lot of land, and did knowingly suffer and permit the said Archibald McKinley to carry on the said business of a distiller there, or, in the phraseology of the said section 44, "the said business of a distiller to be there carried on by him." Therefore, all the right, title, and interest of Philip Plunket in this distillery and lot of land, according to this section 44, was forfeited to the United States, and a decree of condemnation should be pronounced, according to the prayer of the libel of information.

It is objected to this, that this section 44 cannot have this effect upon the real estate of Philip Plunket, under the clauses of the Constitution of the United States prohibiting the passing of a bill of attainder or forfeiting real estate, even for punishment of treason, except for life; arguing that the forfeiting real estate by the mere enactment of the legislature, without offense or delinquency of the owner, is, in practical effect, a bill of attainder, certainly open to the same objection, and when the fundamental principle of our government will not allow forfeiture, except during life, for the highest crime, it certainly cannot be suffered for a misdemeanor.

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In answer, it is obvious to remark, that these clauses of the Constitution of the United States have respect to high crimes, and punishment of them, restraining rigor, and guarding against arbitrarily enacting guilt. The case before the court is a civil suit *in rem*, against the thing, to ratify the seizure of it, and the provision of the act of Congress under which it is alleged to be forfeited, and therefore was seized, is a regulation of civil policy, framed to secure to the United States fair payment of taxes imposed for the support of the government, a regulation of civil policy to accomplish a purpose vital to government; for without revenue the government cannot exist; and what measures may be requisite to enforce the collection of a tax, it is for Congress, in the exercise of its legislative power, to determine. That power is not unlimited; but what are the objections to the provision upon which this case depends?

Certainly, Congress can impose a tax on distilled spirits, and provide the processes and measures for collecting it; for preventing the government being defrauded of it; and what measure more obvious, germane, or suitable, than to make the defrauding of the tax cause of forfeiting the distillery (*viz*: the building and the lot of land on which it is situated), the provision under consideration.

The objection that would first occur would be, that the forfeiture is unreasonably large; but of this, Congress is the rightful judge, and experience in this matter has guided to this provision. There is no objection; it is in natural course; it is common to make the use of a thing for an unlawful purpose, its employment in an injurious way, cause of its forfeiture. Carrying on the distilling business, with intention to defraud the government of the taxes on the spirits distilled, and actually defrauding it, the case before the court upon this verdict, so far from exhibiting the pro-

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vision complained of as intolerable for hardship, commends it to a sense of justice and propriety. I can see no force in the protest against its action on real estate—fee simple in land.

Under the feudal system, all title to land was derived from the king, and held for doing service to him; and those holding from him granted to those under them, upon like tenure, doing service to them; the holders or tenants must all be choice men, in whom there was personal trust to perform the stipulated service—all controlling considerations of the grants, in those times of violence and war. But the tenants must hold the land in order to perform the service. The service was indispensable; hence the land was inalienable, the service being essentially personal; and the feudal system thus established principles of land tenure, which the nation, as it became commercial, had a constant struggle with—an interesting part of English history.

We have never adopted nor allowed like principles in our land tenure. Our earliest statutes, 1694 and 1700, make land liable to pay debts, when sufficient personal estate cannot be found; and it was not till about seventy years afterward, about 1770, that the regulation was made that, if the profits would pay the debt and interest in seven years, the land should not be sold, but delivered to the creditors on elegit, to be held till payment from the profits. This regulation does not affect the character of land in its liability for debt. It can be sold from the owner by adverse proceedings, in fee simple, for debt, for taxes, for a fine for an assault and battery upon a judgment of a justice of the peace; it is property, and subject, as property is subject, to answer demands which law makes upon it for the ends of justice.

As a further reason against construing and administering the provision of the act of Congress upon which

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this case rests, according to its literal meaning, it is contended that it is in practical effect a bill of attainder, taking from Philip Plunket this real estate, by mere force of enactment, without offense or delinquency on his part.

I have already met this argument. I may add, further, this is not a proceeding against Philip Plunket; he has intervened in this case, making himself, of his own accord, a party. The proceeding is against this distillery, as a thing forfeited for being used as a means for carrying on the business of distilling spirits, with intent to defraud the United States of the tax on the spirits distilled; and the allegation informing Philip Plunket, who has made himself a party to the proceeding, why his property is forfeited, is, that he knowingly permitted the distiller who carried on this business to use this distillery. As the use was by his permission, he must abide the consequences.

The distillery is thus made, by this provision of the act, a pledge, to the amount of its value, that the business of distilling in it shall be carried on fairly, without intention to defraud the United States of the tax on the spirits distilled, or any part of it; and Philip Plunket, by knowingly permitting its use under this provision—and no man is allowed to plead ignorance of the law, and also the written instrument under his hand, according to the eighth section, attests his privity—consents to this; so that this view of the case comes to this point—that Philip Plunket, knowingly permitting this property to be used as a distillery, subjects it to be security for the fair carrying on of the business. This is the scope of the provision, and there can be no objection to it.

Let there be a decree of condemnation in the usual form.

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Parrott v. Barney.

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## PARROTT v. BARNEY.

*Circuit Court, Ninth Circuit ; District of California,  
October T., 1870.*

LANDLORD AND TENANT.—LIABILITY FOR WASTE BY  
EXPLOSION.

The general rule is that in the absence of a special agreement to the contrary, the tenant is liable to the landlord for all waste, by whomsoever committed ; having his right of action over against the actual wrong-doer.

This liability does not depend upon negligence, but is imposed for reasons of public policy.

A covenant in a lease, that at the expiration of the term the tenant will quit and surrender the premises in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted, does not protect the tenant from liability for waste, although resulting from accident occurring without fault of the tenant.

A covenant in a lease that the tenant will occupy the premises solely for a specified business, does not impose upon the landlord the risks of injury to the premises incident to the business, so as to defeat his right of action for waste incurred in the prosecution of such business, although not caused by any fault of the tenant.

A tenant of a portion of a building may be held liable to the landlord for waste sustained therein. The liability is not confined to waste upon *lands* demised.

In order to hold carriers liable for damages for injuries sustained by the occupant of premises adjoining their storehouse, through the explosion therein of a highly dangerous article,—*e. g.*, nitro-glycerine,—held for transportation, the proof must show either that the defendants introduced the article with a knowledge of its dangerous character, or that they were negligent in the care and management of it. There is no absolute rule that the occupant of premises is an insurer against ill consequences to others from everything which he introduces upon them, irrespective of knowledge of its dangerous character. Nor is a carrier bound, as such, to know the character of the goods received by him for transportation.

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## Action for damages for waste.

The action was brought by John Parrott against D. N. Barney and several others composing the firm of Wells, Fargo, & Co.

The complaint contained four counts. The first was by the plaintiff as landlord, against the defendants as tenants from year to year, to recover for technical waste. This count was founded upon statute. The waste was charged to have resulted from negligently introducing an explosive substance, viz: nitro-glycerine, upon the premises, the explosion of which had injured them.

The second count was in the nature of a count in case at common law, by the landlord against a stranger, for injury sustained through the same explosion, to the plaintiff's reversionary interest in adjoining premises, also owned by the plaintiff, and leased by him to third parties, viz: one Bell, and the Union Club. The injury was alleged to have resulted from negligence in introducing the explosive substance.

The third count was also in the nature of a count in case at common law, by the landlord against his tenant, for waste to the demised premises, and also for injuries resulting from the same acts, sustained by the reversion in the other premises demised to other tenants; and also charged the injury to have been caused through negligence.

The fourth count was for waste committed upon the premises demised to the defendants, and for injuries alleged to have been committed by defendants *vi et armis*, to the premises demised by plaintiff to Bell and the Union Club.

The answer denied all the material allegations of the complaint. It also set forth the lease under which the defendants held the premises from the defendants, and alleged that defendants had the right thereunder

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to carry on the business of expressmen in the demised premises. It also averred that, before suit brought, the defendants had repaired the demised premises, to the plaintiff's satisfaction, and with his approval.

The following is a summary of the facts proved, condensed from the findings of fact upon which the circuit judge founded his opinion.

The defendants constituted a well-known express company. The plaintiff was, prior to the date of the casualty described in the complaint,—April 16, 1886,—owner of land and buildings in San Francisco. The defendants held and occupied, under a lease from the plaintiff, a portion of these premises, described in the lease as "The basement and first floors contained in that certain granite building, situate, &c., together with all vaults and permanent banking fixtures therein contained ; together with the use of a brick warehouse in the rear, thirty by sixty feet, and the right of way and free passage thereto through the back yard of said premises, and all appurtenances thereunto belonging."

The lease contained the following covenants on the part of defendants, viz: "It is likewise agreed that the said parties of the second part shall not receive in said demised premises, either for their own account or on storage, or allow any person to place therein, gunpowder, alcohol, or any other articles dangerous from their combustibility ; that they will, during the term of this lease, occupy the premises solely for the business of their calling, to wit, banking and express office, and that they are not to under-let the same to any other person or persons, for any other business, in part or the whole, without the prior consent in writing of the party of the first part." And the defendants also covenant, "at the expiration of the said term to quit and surrender the said demised premises, with all fixtures therein contained, in as good condition as the reasonable use and wear thereof will permit, damages by the

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elements excepted." The rent was twelve thousand dollars per annum, payable in monthly installments of one thousand dollars each in advance.

In April, 1866, one Garrett W. Bell, as tenant from year to year of plaintiff, occupied a portion of the buildings described in the complaint, to wit, "The first, or lower floor of said iron building, and of that of the said brick building, situate to the northwest thereof, and called a furnace;" also, a corporation, called "The Union Club of San Francisco," as tenant of plaintiff, upon terms hereinafter stated, was in the possession and occupation of the remaining portions of the premises, being the whole above the first, or lower floor, of all the said buildings and premises.

The portion of the premises occupied by defendants had been used for their banking and express business, as provided in the lease, from the commencement of the term down to, and including, April 16, 1866.

The defendants, during all that time, were carrying on the business of public express carriers throughout the States and Territories of the Pacific coast; also between New York and San Francisco, by the way of the Isthmus of Panama, using on the latter route the steamships of the Pacific Mail Steamship Company's lines, running between New York and Aspinwall, and Panama and San Francisco, to convey their express matter, transporting the same across the Isthmus by the Panama Railroad. Their steamers, at that time, left New York three times each month—on the 1st, 11th, and 21st days of the month. It was a regulation established by defendants, that no express freight should be received at the wharf in New York on days appointed for the steamers to leave New York for Aspinwall. The steamers sailed from Pier No. 42, North River.

On the afternoon of the last regular day for the steamer to leave New York for Aspinwall, prior to

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March 14, 1866, and after the steamer had left, a man brought to Pier No. 42, North River, from which the steamers were accustomed to take their departure, a case in a wagon, and asked Patrick O'Leary, who was the defendants' freight measurer on Pier No. 42, to receive it. O'Leary informed him that they did not receive freight on the day of the steamer's sailing. The man said it would be hard to require him to take it back, as he had brought it a great way, from Harlem, some seven miles distant. O'Leary told him, that, since he had brought it so far, he could leave it there at his own risk, but that he could not give a receipt for it on that day; the party must come the next day and get a receipt. The party then carried in the case and placed it opposite the freight office on the dock. O'Leary then noticed that the case had not been marked, or weighed, or strapped, as required by defendants' regulations, and called the party's attention to these facts; whereupon he requested O'Leary to weigh, mark, and strap the same, saying that he would pay for it. O'Leary then, in pursuance of the party's directions, marked upon the box the address. He also procured some wooden straps, or hoops, some nails, and an adz, and strapped the case, driving the nails through the hoops, or straps, into the case, as required by the defendants' regulations. The case then lay there ten days, till the next steamer left. Two days after the case had been thus left, the party who brought it came down and applied to O'Leary for a receipt, and O'Leary told Mr. Middlebrook to give a receipt for the case, and Mr. Middlebrook, who was the tally clerk at the time, and the proper party to give the receipt, did so in the presence of O'Leary.

At the time the case was presented, it was clean, and appeared to be in perfect condition. There was nothing suspicious about its appearance. The only thing wanting to make it conform to the regulations of the defend-

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ants was, it required strapping, weighing, and marking, and when strapped, weighed, and marked by O'Leary, it appeared to be in all respects in proper condition for shipment. The case was an ordinary wooden box used for shipping goods in, apparently some two and a half feet square by three feet long. It measured fourteen feet eleven inches cubic measure, and weighed three hundred and twenty-nine pounds.

The usual course of business in receiving such freight was, that O'Leary received and marked it, Middlebrook gave a receipt for it, and it then remained on the wharf with other freight without any one taking other special notice of it, till it was carried on board ship and stowed by the stevedores : and this case took the usual course in these respects. Also the party receiving the receipt was accustomed subsequently to present it at the office to the express receipt clerk, who would take it up, and from it make out the ordinary express receipt, and deliver it to the shipper. In this instance, the receipt thus given by Middlebrook was surrendered, and the usual express receipt given. The receipt given by the tally clerk (such as that given by Middlebrook in this instance), on the delivery of the freight, was the original from which the express receipts, bills of lading, manifest, and all others are made up. The clerk making out the express receipt for the shipper, or the bill of lading, as the case may be, was always governed by this original, and he did not see or inspect the freight itself. After express matter was thus delivered, and the said original receipt given to the party delivering it, it was allowed to go into the general mass of freight of that kind, and to remain there till taken on board the steamer.

Neither at the time of the delivery of the case in question, nor of the taking of said receipt, was there anything said about the contents of this box, either between O'Leary and the party bringing it, or between

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the latter and O'Leary and Middlebrook, nor at any other time ; nor, so far as appeared by the evidence, was anything said at any time to the defendants, or any of their employees ; and neither of said employees or defendants had any idea or suspicion that it contained anything dangerous. No questions were asked as to its contents, and no information given.

The case was shipped with a large quantity of other express freight, on the steamer that left New York for California on March 21, 1866. At that time the defendants sometimes carried to California as many as six thousand packages, put up in cases of a similar character and appearance, per steamer, in addition to a large number shipped for Panama, South America, Mexico, and other places, and a fair average of such packages of merchandise, shipped to California by each steamer, was from four to five thousand. The steamer from Panama, connecting with the steamer which left New York on March 21, arrived in San Francisco in due time, on April 13 or 14, having the case on board.

On the afternoon of the 14th, the case was taken from the vessel and placed upon the wharf, and was found to be leaking. The leaking had evidently commenced since the steamer left Panama, and the substance leaking from the case had the general appearance of sweet or salad oil. The case was left on the wharf till the morning of the sixteenth day of April, when, in pursuance of the regular and ordinary course of defendants' business, where express freight is found to be damaged, it, together with another case of somewhat similar appearance, containing silver ware, which had been stained by the substance leaking from the case in question, and appeared to be in a damaged condition, was sent by a dray to defendants' office, the premises in question, for examination, and the steamship company was notified to send an agent to be present and examine the package in conjunction with an agent of

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defendants, for the purpose of ascertaining the nature and extent of the damage, and of determining, if possible, whether the responsibility for the damage rested upon the steamship company. The two packages were taken to the premises in question by defendants' servants, and deposited on said premises in the open court or yard, in the rear of the express office, and between it and the premises occupied by Mr. Bell, which was the usual place of examination of such packages when found to be damaged.

About one o'clock, P. M., Mr. Havens, as the representative of the Pacific Mail Steamship Company, and Mr. Webster, of the defendants, in company with another of defendants' employees, and in the presence of Mr. Knight, the second person in authority in the management of defendants' business on the Pacific coast, with a mallet and chisel proceeded to open the case for examination, and while engaged in opening the said case with the mallet and chisel, the substance contained in it exploded, instantly killing all the said parties and one or two others, besides destroying and greatly injuring the premises in question in the manner described in the complaint.

The plan and mode of opening and examining the case in question, was the same usually adopted in the ordinary course of the defendants' business in respect to packages of similar apparent character.

Upon a subsequent examination and experiment with chips saturated with the liquid which had leaked from this case, taken from the wharf and other places where the leakage had occurred, it was ascertained that the substance contained in the package was nitro-glycerine, or glonoin oil. The case contained some thirty gallons of nitro-glycerine, and the explosion of this substance occasioned the loss of life and injuries stated.

In respect to the character and qualities of nitro-glycerine, the testimony further showed that it is, when

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pure, a nearly colorless substance, but when impure, it is nearly the color and consistency of sweet or salad oil. It is a liquid, and violently explosive. It is exploded by percussion and concussion, and by a high degree of pressure, but not by the mere contact with fire, either with flame or a burning coal. It will burn slowly without exploding by applying a flame to it, while the flame is in actual contact, but when the flame is withdrawn, it will cease to burn. Although it will burn while in contact with flame, yet it takes fire with difficulty, and is not, in the common sense of the term, apt to take fire. It is not dangerous from the mere application of flame—as the flame of a candle—but in explosion, combustion takes place, and in that view it is combustible and dangerous. It will also explode upon being heated to a temperature of some three hundred and sixty degrees Fahrenheit. It gradually decomposes when kept, and decomposition in a closed vessel disengages gases, the pressure alone of which may spontaneously explode it. Pressure, or the application of force, is the immediate cause of the explosion. In this instance, the nitro-glycerine, in one or more of the cans contained in the case in question, had, doubtless, become partially decomposed, generating gases, which occasioned pressure within the can, and a greater tendency to explode from external forces, and the percussion, or concussion, resulting from opening the box with the mallet and chisel, operating in connection with such internal pressure, must have produced the explosion.

Nitro-glycerine, as a blasting agent, had been then only very recently brought to notice; and its properties, the proper manner of managing it, and the danger of misuse, were not generally understood, until after this accident and some subsequent ones awakened public attention.

Previous to this occurrence, nitro-glycerine was generally unknown to the public as an article of com-

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merce ; and was unknown to parties engaged in the business of transportation ; and at that time there was no oil or liquid of an explosive character like nitro-glycerine, known to commerce ; and even among scientific men, the properties of nitro-glycerine were not so well understood as at present. Neither the defendants, nor any of the employees of the defendants, nor of the Pacific Mail Steamship Company, who had anything to do with the package in question, nor the managing agent of the defendants on the Pacific coast, nor any of those killed by the explosion, knew the contents of the case in question, or had any means of such knowledge, or had any reason to suspect its dangerous character, nor did they know anything about nitro-glycerine or glonoin oil, or that it was dangerous.

There was no proof of actual negligence on the part of the defendants in receiving the package, or in their failure to ascertain its dangerous character ; nor, in view of the condition of their knowledge, of the want of means of knowledge, and the absence of any reasonable ground of suspicion, were they chargeable with negligence in the handling of the package at the time of the explosion.

The defendants either repaired or paid for the repairs (to the amount of about six thousand dollars) of the premises-occupied by themselves, except a portion of certain repairs made by plaintiff, which were necessarily made in connection with repairs made to those portions of the premises occupied by the other tenants of the plaintiff, and which defendants omitted to pay for by mistake.

The value of the repairs to the premises occupied by defendants, and chargeable thereto, thus omitted to be paid by them, was one thousand seven hundred and eighty-seven dollars and sixty-two cents.

The damages resulting from the explosion to the premises not occupied or held by defendants, but occu-

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pied by the other tenants of plaintiff named in the complaint, viz: Bell and the Union Club, amounted to twelve thousand eight hundred and fourteen dollars and sixteen cents. And the amount of rent for the portions of the injured premises occupied by the Union Club, from the date of the explosion until the premises were put in a tenantable condition, and which, according to the terms of their agreement of lease, the Union Club refused to pay, amounted to nineteen hundred and sixty dollars; all these sums being estimated in gold coin.

*J. P. Hoge and John T. Doyle, for the plaintiff.*

*S. M. Wilson, for the defendants.*

SAWYER, J. (after stating the facts).—As to the waste upon the premises demised to the defendants, I think that, upon the facts found, the defendants are liable; although, as will hereafter appear, there was, in my judgment, no negligence on their part. There was, doubtless, fault on the part of those who delivered the explosive substance to defendants for carriage over their express route, without informing them of the dangerous character of the article, for which they may be liable to defendants. The rule seems to be established, that, with respect to liability for waste, the tenant is in a position analagous to that of a common carrier, and without some special agreement to the contrary, responsible for all waste, however or by whomsoever committed, except it be occasioned by act of God, the public enemy, or the act, of the reversioner himself. 4 *Kent Com.* 77; *Attersol v. Stevens*, 1 *Taunt.* 182; *Cook v. Champlain Transportation Co.*, 1 *Denio*, 91; 2 *Eden Inj.* 198 and notes. In *White v. Wagner*, 4 *Harr. & J.* this doctrine was carried out in an extreme case. The tenant is held responsible to the landlord,

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and left to his remedy over against the delinquent party. The liability does not depend on mere negligence, but it is imposed on the same grounds of public policy as those upon which the strict liabilities of common carriers are made to rest.

It is claimed in this case, that the covenant in the lease "at the expiration of the term to quit and surrender the said demised premises . . . . in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted," is a waiver of the tort; that it only binds the defendants to reasonable care, and protects them from liability for waste resulting from accidents occurring without their fault. Also, that the covenant to "occupy the premises solely for the business of their calling, to wit, banking and *express* offices, and that they are not to underlet the same to any other person or persons, for any other business in part or the whole, without the prior consent in writing of the plaintiff," both entitles and requires the defendants to occupy the premises as an express office, and that by authorizing and requiring the defendants so to occupy, the plaintiff took upon himself all the risks incident to such business, not resulting from the wrongful act or negligence of the defendants; and that the accident in question is one of the risks so incident to the business, and for which defendants are not liable. After some hesitation, I conclude that neither of these positions is tenable. As to the first, one or two authorities seem to favor that view, but the weight of authority appears to be the other way. The authorities cited to sustain the latter proposition do not appear to me to be applicable to the facts of this case. If the defendants' counsel is correct in his position, I do not perceive why a tenant, who is to occupy the premises for a lawful purpose, in accordance with the terms of his lease, should be liable in any case for waste resulting from the wrongful act or negli-

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gence of a stranger, he himself being faultless. This would be totally inconsistent with the rule as stated in the authorities already cited.

It is also insisted that no waste can be found where the *land itself* is not the subject of the demise, and that, as defendants were only tenants of the basement and first story, there could be no waste. It does not appear to me that the authorities cited go to that extent. There may be a freehold estate in apartments. 1 *Greenl. Cruise*, 49, § 21. The absolute destruction of the basement and first floor, demised to defendants, in the building described in the complaint, falls clearly within the defendants' own definition of waste, viz: "Waste is a spoil and destruction of the estate, either in *houses*, woods, or *lands*, by demolishing not the temporary profits only, but the very substance of the thing." Here is the destruction of the substance of a house, and even of land, in the legal sense of the term, which embraces the building. The result is, that the defendants are liable for the waste on the premises demised to them.

As to the premises demised to other tenants, the question of liability depends upon entirely different principles. The action is not based upon the covenants in the lease to defendants, and it is, therefore, unnecessary to inquire whether there was a breach of the covenant in that lease, not to introduce into the premises demised to defendants, any articles "dangerous from their combustibility." And I do not perceive that the relation of landlord and tenant, between the plaintiff and defendants, as to other premises than those injured, has any bearing unfavorable to the defendants, upon the question of their liability. The defendants, in my judgment, stand in this kind of action in no worse position as to the premises occupied by Bell and the Union Club, than they would have been in, had the explosion taken place upon premises of which they

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themselves were seized in fee, and destroyed the adjoining premises, leased by plaintiff to said Bell and the Union Club.

What then are the rights and responsibilities of the parties upon the facts, considered as strangers to each other, with respect to those premises? If the defendants are liable, it must be upon one of two grounds, either, *firstly*: that a party who introduces upon his own premises a highly dangerous substance, which, in consequence of such introduction, in some way injures his neighbor, is liable for the damages at all events, and under any and all circumstances, without regard to fault or negligence; or, *secondly*: that the injury has been caused through the negligence and want of proper precaution and care in the party in introducing, or in managing such a substance after its introduction. Plaintiff's counsel insist that defendants are liable upon both grounds.

In support of the first ground, the strongest case cited is *Fletcher v. Ryland*, *Law Rep. 1 Exch.* 265; and the same case in the house of lords on appeal, affirming the judgment of the court below. *Law Rep. 3 App. Cas.* 330. The defendant in that case constructed a reservoir to supply water for a mill situate upon his own premises, into which he diverted from their natural course the waters of a stream. In the construction of the reservoir, the engineer and workmen found five old shafts, which had been filled up with marl and clay. The shafts led down to certain passages, which had been excavated in working a coal mine, and which extended to, and connected with, the mine of the plaintiffs on their own premises, adjacent to those of defendant. The defendant was not aware of the existence of either the shafts or passages on his premises, but his workmen and engineer, in constructing the reservoir, found the shafts, although they did not know with what they connected. The water from

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the reservoir broke through one of the shafts, ran through the passages into plaintiff's mine, and produced the injury in question in the action. The court found, as a fact, that *there was negligence* on the part of the defendant's engineer and workmen in the construction of the reservoir ; but the decision was not put on that ground. The defendant was held liable, and it must be admitted that the court stated broadly, that when a party brings an article upon his premises *known* to be dangerous, and liable to escape upon his neighbor's premises, and do injury, he is bound to see that it does not escape and do harm.

The other cases cited, are cases where parties in blasting with gun or blasting powder, upon their own premises, have thrown rock upon and injured their neighbors, or their neighbors' premises, and cases of a similar character ; as *Hay v. Cohoes Co.*, 2 *N. Y.* 159.

The observations of the judges in delivering their opinions must be considered with reference to the facts of the cases decided. In all these cases, and in the examples cited by the judges as illustrations of the principle adopted, the liability to escape and do injury, and the dangerous character of the article introduced, were necessarily known to the party introducing it. The properties of water and gunpowder are known to everybody. The liability of water collected in large bodies to escape through pressure, and of gunpowder to violently explode and do injury, are known to all persons of common sense in civilized communities, no matter how ignorant they may be in literary and scientific matters. It is a part of the common and general knowledge of the community, of which everybody is presumed to be possessed, and of which, as such, the courts are bound to take judicial notice. Any party who introduces these things into his premises, does so with a full knowledge of their dangerous properties, and of their liability, even with the utmost care and

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precaution, to elude his vigilance, baffle his control, and escape and injure his neighbor.

It is worthy attention, that in the case of *Fletcher v. Ryland*, in the court of exchequer, two of the judges were of opinion that defendant was not liable, and judgment was entered in accordance with this view; but the judgment was reversed on appeal in the exchequer chamber, and this last judgment affirmed in the house of lords. BLACKBURN, J., who delivers the opinion of the court in the exchequer chamber, does not fail to note *knowledge* on the part of defendant of the liability to escape, and do mischief, as an important element to be considered on the question of liability. He says: "It seems but reasonable and just, that the neighbor, who has brought something on his property which was not naturally there, harmless to others so long as it is confined to his own property, *but which he knows* to be mischievous, if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property." 1 *Law Rep. Exch.* 280. And his illustrations clearly show, that *knowledge* is an important element in the liability. For instance, he says, that a man is answerable for damage done by the escape of his beasts into his neighbor's field, for the *grass they eat and trample on*; for this is the *natural consequence* of their escape: but he is not liable "for any injury to the persons of others, for our ancestors have settled that it is not the general nature of horses to *kick* or bulls to *gore*; but if the owner *knows* that the beast has a vicious propensity to attack man, he will be answerable for that. *Ib.* Again, he says, "so in *May v. Burdett*, the court, after an elaborate examination of the old precedents and authorities, comes to the conclusion that, 'a person keeping a mischievous animal, *with knowledge* of its propensities, is bound to keep it secure at his peril.' And in 1 *Hale's Pleas of the*

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*Crown*, 430, Lord HALE states that when one keeps a beast, *knowing his nature or habits* are such that the natural consequence of his being loose is that he will harm men, the owner 'must, at his peril, keep him up safe from doing hurt, for though he use his diligence to keep him up safe, if he escape and do harm, the owner is liable for damages.' . . . In these latter authorities, the point under consideration was damages to the person, and what was decided was, that *when it was known* that hurt to the person was the *natural consequence* of the animal being loose, the owner should be responsible in damages for such hurt, though when it was *not known* to be so the owner was not responsible for such damages ; but where the damage is, like *eating grass*, or other ordinary ingredients in *damage feasant*, the *natural consequence* of the escape, the rule as to keeping in the animal is the same." *Id.* 281. In affirming the judgment of the exchequer chamber, in the house of lords, the lord chancellor quoted the first passage above cited from the opinion of BLACKBURN, J., together with the context, and said, "In that opinion, I must say, I entirely concur." 3 *Law Rep. App. Cas.* 340.

Thus, it is apparent from the language used and the illustrations cited, that *knowledge* of the dangerous character or mischievous propensities of the thing or animal introduced, on the part of the party introducing it, is an essential element in the cause of action. The "natural consequences" of the escape must be *known*, but the *ordinary* natural consequences of the escape of a tame beast, as the eating and trampling down of grain, grass, herbage, &c., the damage from flooding with water, filth, &c., are matters of universal knowledge, of which everybody is presumed to be cognizant, and of which everybody is bound to take notice. Since a party is bound to know those things, the law presumes that he does know them, and holds him re-

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sponsible without special allegation or proof of knowledge. But all tame animals are not vicious—the goring of a man is not the ordinary consequence of an escape of a tame beast. When such a beast is vicious and liable to attack and gore people, or do other like kinds of mischief, it is an exception to the general rule, and all mankind are not presumed to know his vicious propensities; hence, in order to render the owner liable for such mischiefs done upon an escape, it is necessary to specially bring home to him knowledge of his vicious tendency. When this knowledge is brought home to him, he is presumed to know the ordinary consequences of the escape of such animal, and is liable for his vicious acts, as in other cases of *knowledge*.  
*m* I know of no case ~~✓~~ which this doctrine has been held, unless knowledge of the propensities or character of the thing working the injury must be presumed by the law from its generally known character, or knowledge was specially brought home to the party dealing with it.

Knowledge, therefore, in some form, must be an essential element in the cause of action. There is some reason for holding that a party who introduces into his premises a substance known to him, or which he is bound to know from the present universal knowledge of mankind, to be dangerous to his neighbor, shall do so at his own peril, and be responsible for the consequences. He deals with the article with full knowledge of his peril, and knowingly assumes the risk. Should he suffer, it would be in consequence of his own folly, if not his fault. But why should a person innocently ignorant of the qualities of a dangerous thing unconsciously brought upon his premises in the pursuit of a lawful calling, not only be compelled to sustain the damage suffered himself, but, also, that suffered by his neighbor from an accident resulting therefrom without his fault. Upon what sound reason can such a doc-

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trine be sustained? To carry the rule to that extent would be to make every man an insurer of his neighbor against the consequences of all his acts, however faultless they may be. In my judgment, the law is not so rigorous and unreasonable.

But it is not clear, that, even as to things universally known to be dangerous, the doctrine laid down can be sustained in the broad language sometimes used in discussing a given state of facts. Fire, for instance, is an element known to all men to be dangerous, yet there are numerous cases where fires purposely set in a party's own grounds have spread to, and damaged his neighbor's premises, as for example, in clearing lands, in which the party setting the fire has been held not to be liable, unless there was negligence. So in the case of water, it was held that when one builds on his own land a mill-dam, on a proper model, and the work is faithfully done, he is not liable to an action, though it breaks, and his neighbor's dam and mill are thereby destroyed. *Livingston v. Adams*, 8 *Cow.* 175. To the same effect are *Hoffman v. Tuolumne Water Co.*, 10 *Cal.* 413, and *Campbell v. B. R. & A. W. & M. Co.*, 35 *Id.* 683. These were not cases that could be referred to *vis major*. I can perceive no good ground for distinction as to the question of liability, between thus accumulating upon one's own land water in a natural stream largely beyond the natural quantity, and introducing it from abroad. See, also, as to bursting of water pipes, *Blyth v. Birm. Water Co.*, 11 *Exch.* 781. These are but examples of a very large number of cases of like character. Why were not the defendants in these instances responsible for all damages resulting to their neighbors, if a party introducing or dealing with a dangerous article, thing, or element upon his own premises is liable at all events, and under all circumstances, without reference to any negligence or any fault on his part? And in these cases the parties had

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*knowledge* of the dangerous character of the matters with which they were dealing. If I am right in the views thus far suggested, the first proposition upon which the liability of defendants for the injuries to the premises occupied by Bell and the Union Club is rested, is untenable.

There must then have been knowledge on the part of defendants of the dangerous character of the explosive substance introduced upon the premises occupied by them, or there must have been what the law deems negligence on their part, or there is no liability.

Upon the question of knowledge, I am satisfied from the evidence, and I so find the facts to be, that nitroglycerine, at the time of the explosion in question, had not become so generally known to the world, commercial or otherwise, as to be a part of the ordinary knowledge of the people, even in intelligent communities. It had hardly yet emerged from the domain of strictly scientific research. It is true, that, at the time, it had recently, to a very limited extent, been introduced to the knowledge of miners and others in Europe; but only to a limited extent. At the very time, efforts were being made by a single person to introduce it into this country for blasting purposes. A short time (but a few weeks) before, an effort had been made—and the first effort of the kind—by one house, to whom a consignment had been made, to bring it into notice in this State; but it does not appear that it had been introduced into public use in other parts of the United States. The knowledge of the article, both of its name and its properties, was confined, comparatively speaking, to a very few. Of course, it is impossible to ascertain, even approximately, the exact extent to which it had become known; but from the general tenor of the evidence, I think it might be safely assumed that not one in a thousand in the United States, or California, would have known anything about the substance or its

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properties, had it been mentioned by its common name, glonoin oil, or nitro-glycerine. However that may be, it is very evident that it was known outside the laboratory of the chemist to a very limited extent, and not sufficiently to be recognized as a part of the common knowledge of the country, even in intelligent circles. It was new—I might say, almost entirely unknown—to commerce. It had not obtained such notoriety that ordinary people, or commercial men, can be presumed to be cognizant of its properties. As an illustration of the state of knowledge, even among scientific men and chemists, of several professors of that science in our colleges and university, examined as experts on behalf of the respective parties, not one had heard of nitro-glycerine, as an article of commerce or of practical utility, or outside the domain of science, prior to the explosion in question in 1866. One professor, who appeared to be well informed in his profession, and as to the article in question, could not say that it had before that time been brought to his attention, even as a matter of scientific interest. Another, who had formerly been a professor of chemistry in the Normal College, in Swansea, Wales, and who has for several years been, and now is, the analytical chemist of the San Francisco Refining and Assaying Office, and professor of chemistry in the Toland Medical College, also in the City College, was so little familiar with nitro-glycerine and its properties, that after the explosion, when some of the chips, saturated with some of the substance which leaked from the case on the wharf, were taken to him for analysis, he did not know what it was. Even after he had proceeded some time with the analysis, applying various tests, and after an accidental explosion had taken place in the course of the process of analysis, the name of the article did not suggest itself to him till he had consulted his toxicological works, and found that a substance apparently having

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the same properties, was called nitro-glycerine; yet he had years before experimented with it in the laboratory as a matter of scientific interest, but the fact had passed from his recollection. In point of fact, attention appears from the evidence to have been but little directed towards the substance, even in the scientific world at large, until called to it by the explosion in question, the one at Aspinwall about the same time, and one or two others occurring at a later date. Since then it has been the subject of extensive experiments, which have brought to light much of the present prevailing particular knowledge with reference to its properties.

With so little general knowledge of the substance, at the time of the accident, outside the laboratory, even among chemists and scientific men, who usually take a special interest in such substances, and who are more likely to notice the progress of their introduction into the practical affairs of life, it could scarcely be expected that the public generally, engaged in the ordinary pursuits of agriculture, manufactures, and commerce, would be informed upon the subject; and, I am satisfied from the evidence, that the substance and its properties were, at the time of the shipment and explosion, almost wholly unknown to the public and to commerce; and further, that while the state of public knowledge was *not* such that the defendants were bound, or could be presumed in law, to know the existence or properties of the substance, I am also satisfied that they did not in fact, nor did any of their employees engaged in handling the case in question, have any knowledge on the subject; that the package was received and handled by the defendants and all in their employ, up to the time of the explosion, in utter ignorance of its contents, or the dangerous properties of the substance itself, had the contents been known; and that they had no ground to suspect its dangerous

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character—nothing to put them upon inquiry, as prudent men, as to what it was.

I do not perceive that the fact of the arrival of the case on the sailing day of the steamer, and after its departure, or that it was not strapped or marked, as required by the regulations of the defendants, has anything in it to suggest to an ordinarily prudent man, engaged in the business of a common carrier, that the case contained anything dangerous. It was, at most, simply indicative that the party presenting it was not acquainted with the requirements of the company, which was, doubtless, no uncommon thing with those who were not in the habit of making frequent shipments. When the defendants' servant was requested to strap the case, he obtained a wooden hoop from a pile kept for the purpose, and the proper implements at hand, and strapped it, driving nails into the box with as much unconcern as if it had been a case of boots and shoes. He evidently had no suspicion that it was liable to explode from the effects of his blows, or that it was in any respect dangerous; and the fact that hoops and implements were kept at hand for such purposes, indicates that this want of conformity to the regulations of the defendants was by no means singular—that such exigencies were anticipated and provided for. The box appeared in all other respects in good condition and suitable for shipment—as much so as the thousands of others of a similar apparent character shipped by the same steamer. There was, then, in fact, no knowledge, and nothing that should necessarily excite the suspicions of a prudent man engaged in that business, and constantly receiving for carriage boxes of merchandise of similar appearance. Indeed, I think it would have been very remarkable, if one receiving and handling *so many* similar cases, upon the facts disclosed by the evidence, had suspected that it contained anything of a dangerous character.

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It is insisted, further, by the plaintiff's counsel, that it was the duty of the defendants to acquaint themselves with the character of the merchandise delivered to them to be carried, and being bound to do so, they are chargeable with knowledge in fact; or that, at least, a failure to acquaint themselves with the character of the article to be carried is, of itself, such negligence as will render them liable. In my judgment, neither proposition is tenable. The numerous authorities cited to sustain these propositions, are cases where parties had sent valuable packages or valuable articles in trunks as baggage, or frail goods requiring great care in handling, and cases of a similar character, and the party sending had either neglected, or upon request declined to inform the carrier of the character or value of the articles contained in such packages or trunks. The questions arose between the party sending and the carrier, in actions to recover for the loss or damage sustained in carrying. In none of these cases, which have fallen under my notice, has it been held that the carrier had an absolute right to know the contents of packages or baggage thus sent; but the consequence imposed on a failure of the owner to give the information when requested, or upon giving false information, is, that he shall not recover the extraordinary value of the articles lost, or for damage to articles requiring extraordinary care to prevent breakage or injury. I know of no case, in which it has been held, that a carrier has an absolute right to know the contents of a package tendered to him to be carried, or that imposes upon him a duty to make inquiry as to the contents of every package, without regard to circumstances exciting suspicion. In fact, the practice is usually otherwise, and bills of lading given to shippers by common carriers, often, if not usually, contain the clause, "contents unknown." *Abbott Shipp*. 339.

The ordinary bill of lading of the Pacific Mail Steam-

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ship Company, which brought the case in question for defendants (a copy of which was introduced in evidence), contains the clause, "contents unknown." If the inquiry were made, there is no certainty that the contents of a package would be correctly given. In all probability, the servant delivering packages seldom knows the contents himself. The only way to obtain evidence would be to open the package, and examine it. The carrier, certainly, would have no right to open every package tendered for carriage. And I apprehend a carrier would have no right to decline a package, on the ground that the owner refused to disclose the contents, unless there was some ground to suspect that it contained something dangerous, hurtful, offensive, or otherwise of a character not proper to be carried. In *Couch v. L. & N. W. R. Co.* 11 *Com. B.* 255, which was an action for a refusal to carry certain goods, the fifty-seventh plea to the first ten counts expressly set up as a defense, that defendants requested the plaintiff to inform them of the contents of the package tendered to be carried ; that the plaintiff refused to give the information, and that defendants refused to carry it on that ground. *Id.* 260. The court held the plea bad. JERVIS, Ch. J., said : "I am of opinion that the fifty-seventh plea is a bad plea. No authority has been cited to show that a carrier is in all cases entitled to know the nature of the goods contained in the packages which are tendered him to be carried ; and there seems to be no good reason why he should be." . . . "This plea founds itself upon the broad and general proposition, that whatever be the nature or quality of a package delivered to a carrier, he is not bound to receive it unless informed of the description of its contents. That proposition involves consequences so highly inconvenient as, in my judgment, to require authority to sustain it. None has been shown." *Id.* 291-2. And MAULE, J., says : "To say that the company may in all cases in-

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sist upon being informed of the nature and contents of every package tendered to them, as a condition of their accepting it, seems to me to be a proposition perfectly untenable. *Id.* 295. CRESSWELL and WILLIAMS, JJ., express individually the same views. *Id.* 297. If the owner is not bound to state the contents of a package under all circumstances, it follows that the carrier is not bound to ask the contents under all circumstances. He is only bound to make inquiries, when he is entitled to have them answered, or when he has ground to suspect that there is something wrong about goods tendered for carriage. Says Lord CAMPBELL, Ch. J., in *Brass v. Maitland*, 6 *Ellis & Bl.* 2 Q. B. 482: "It would be strange to suppose that a master or mate, having no reason to suspect that goods offered to him for a general ship may not be safely stowed away in the hold, must ask every shipper the contents of every package." If the carrier has reason to believe that the package contains anything dangerous, or not proper to be carried, he, doubtless, may refuse to carry it, unless the contents are disclosed, or he is satisfied as to its character. He may, at least in England, for a statute upon the subject expressly authorizes him to do so; but if he refuses to carry on that ground, he must allege and prove the reasonable ground, or he will fail in his defense. 14 *Com. B.* 291-2.

It is, however, the duty of the shipper, at least, if he himself has knowledge, to give notice of the dangerous character of any package delivered to a carrier, where the party receiving it may not, upon inspection, be reasonably presumed to know its character. There is an implied undertaking that it is not dangerous. *Brass v. Maitland*, 6 *Com. B.* 470; *Farrant v. Barnes*, 11 *Id.* 561; *Shearman & Redf. Negligence*, § 593; *Pierce v. Winsor*, 2 *Cliff.* 27. But even in that class of cases where the action is between the ship-owner and the shipper, growing out of the contract of carriage,

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COMPTON, J., said, in *Brass v. Maitland*, *supra*, the count under consideration "clearly falls within the principle of the case of *Williams v. East India Co.*, 3 *East*, 192. In that case Lord ELLENBOROUGH remarks, in giving judgment of the court, on page 200: 'In order to make the putting on board wrongful, the defendants must be cognizant of the dangerous qualities of the article put on board;'" and, 492: "It seems very difficult to hold that the shipper can be liable for not communicating what he does not know." After suggesting some illustrations, he says: "Again; suppose that there is a new article of commerce, which neither shippers nor ship-owners know to be dangerous; is the innocent shipper to be liable? Lord ELLENBOROUGH's *dictum*, in *Williams v. East India Co.*, 3 *East*, 192, above referred to, would tend to show that knowledge of the party shipping is an essential ingredient." *Id.* 491-2. And these views seem to be approved by the court, in *Hutchinson v. Guion*, 3 *Com. B. N. S.* 163. Perhaps this is the true legal principle between the shipper and carrier, when the shipper has *no means* of knowledge or *ground for suspicion*, as well as none in fact; but otherwise the doctrine, I think, can hardly be maintained in the broad terms in which it is stated by the learned judge. But in either view, the reasoning applies with much greater force, as between the carrier who receives the package without knowledge, or possible means of knowledge, or reason to suspect its dangerous character, in the due and ordinary course of his business, to carry for another, and a stranger who happens to be injured by it, through a faultless accident occurring in the ordinary course of transit.

But whatever the true rule may be as between the shipper and carrier, it seems reasonable that there should be no liability as between the carrier and the stranger, when both are equally innocent. As between

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carriers and strangers, between whom no privity exists, the carrier cannot be held to the same rigid rules of responsibility as those which apply to the dealings between the shipper and carrier. While a man is bound to use his own as not to injure his neighbor, this maxim does not make him an insurer of his neighbor's property against all accidents that may happen through his acts, but only requires of him reasonable care and precaution.

I might as well here refer to *Pierce v. Winsor, supra*, cited by plaintiff's counsel as a strong case in their favor. That was a case between the ship-owner and a party who had chartered a ship for a voyage, and then put her up as a general ship. The ship was at the sole use and disposal of the charterer, and it was stipulated that their own stevedores should be employed by the owners. Some mastic put on board in casks escaped, ran together among other goods and hardened, damaging said goods. The owner, having paid to the owners the damages to the other goods, sued the charterer. This case, however, does not appear to be inconsistent with the views of COMPTON, J., in *Brass v. Maitland*, with the limitations before suggested in this opinion. Neither the owner nor shipper had actual knowledge of the liability of the mastic to do injury. Both being equally ignorant in fact, the liability was put upon the ground, that, although the ship-owners and their employees had *no reasonable means during* the lading to ascertain the quality of the goods, or narrowly examine the sufficiency of the packing, the *shippers had such means*; and that it seemed expedient, that although in fact ignorant, the loss should fall on them rather than on the owners—on the party *having the means* of knowledge, rather on the one *who had them not*. The case does not appear to me against the defendants in the case at hand. On the contrary, it recognizes the principle adopted in this

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opinion: that the carrier, in receiving goods for transportation, independent of any suspicious circumstances, has no means of knowledge of the contents and character of packages delivered to him for carriage.

I think, therefore, that the defendants, without any ground of suspicion as to the character of the contents of the case in question, had no means of knowing their dangerous qualities, and were not, as to the plaintiff—a stranger to the contract for carriage—bound in law at their peril to know their character. That they did not in fact know, and that they had no reason to suspect the dangerous character of the package, I am satisfied from the evidence, and so find the facts in the case to be.

For similar reasons, there was no negligence, under the circumstances, in not inquiring as to the contents of the package. The defendants were acting in the ordinary course of their business. It was a culpable violation of duty on the part of the owner to deliver a dangerous article, exhibiting no external indications of its real character, without informing them as to the danger. In the exercise of his lawful rights, every man has a right to act on the hypothesis that every other person will perform his duty and obey the law; and in the absence of any reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to a danger, which can only come to him through a disregard of law on the part of some other person. *Fetter v. New York & Harlem R. R. Co.*, 2 *Keyes*, 154; *Earhart v. Youngblood*, 17 *Pa.* 332; *Deyo v. New York Central R. R. Co.*, 34 *N. Y.* 10-11; *Curtis v. Mills*, 5 *Carr. & P.* 489.

At this time there were regularly carried to California, by defendants, by each steamer, besides those carried to Panama, Central and South American ports, from four to six thousand packages of a similar general external appearance. It would be unreasonable in

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the extreme, to expect them to know or make inquiries as to the contents of each package. It is not the habit of ordinarily prudent men engaged in the business of common carriers to do so. No reasonable man would take such extraordinary precautions, and the law imposes upon carriers no such extreme degree of care. In *Shearman & Redf. on Negligence*, § 6, the rule of law is well stated, as follows: "The law makes no unreasonable demands. It does not require from any man superhuman wisdom or foresight. Therefore, no one is guilty of culpable negligence, by reason of failing to take precautions which no other man would take under the like circumstances. If one uses every precaution which the present state of science affords, and which a reasonable man would use under the circumstances, he is not held responsible for omitting other precautions which are conceivable, even though, if he had used them, the injury would certainly have been avoided." "In determining what is negligence, regard is to be had to the growth of science, and the improvement in the arts which takes place from generation to generation; and many acts or omissions are now evidence of gross carelessness, which a few years ago would not have been culpable at all; as many acts are now consistent with great care and skill, which in a few years will be considered the height of imprudence." (*Id.* § 7). Having, then, no absolute right to know the contents of packages delivered for carriage, and there being no reasonable ground to believe that the case in question contained anything dangerous; and it not being the practice of ordinarily prudent men engaged in the business of carriers to ascertain the character of all goods carried; and having a right to rely upon the presumption that no breach of duty would be committed by the shipper, by delivering a highly dangerous package without giving notice of its character; there was no negligence on the part of

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the defendants in omitting to ascertain the contents of the case in question.

And for similar reasons, there was no culpable negligence on the part of defendants in opening the case with a mallet and chisel, in the mode pursued in this instance, for the purpose of ascertaining the extent of the damages. This was the ordinary mode of opening boxes of an apparently like character. It was opened in the presence of a representative of both the steamship company and the express company, in the regular course of business, when it is found that a package has been damaged, in order to ascertain both the extent and character of the damage, and which party is responsible. The parties engaged were wholly ignorant of the character of the substance with which they were dealing. At that time there was no oil known to commerce, or commonly known to be an article of practical utility, or known to defendants or their employees, which would explode by percussion or concussion. The oil which leaked out had the general appearance of sweet or salad oil, which, as also any other oil known to commerce, would have been perfectly innocuous under similar treatment. The box was manipulated in the presence of Mr. Knight, the second in authority in the management of defendants' business on the Pacific coast, and of two others of the principal clerks of the two companies, and other employees acting under their direction. They, as well as those who received the package in New York, who unloaded the package from the ship, those who tumbled it about on the wharf, and carted it to the premises in question on a dray, acted in all respects as men ordinarily would act, who are unconscious of danger, and as no man of common sense, having reason to apprehend danger, would have acted. They forfeited their lives as the penalty of their faultless ignorance. Yet they acted as any other men of ordinary prudence, or even

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of extreme prudence, with the same knowledge, or means of knowledge, or want of reason to apprehend danger, would have acted—as any man of prudence would have acted under the same circumstances. It would not have been negligent to have opened the case of silver ware, having a somewhat similar appearance, which was also saturated with oil, as the result shows, from the leaking case, and which was sent up with the latter for a similar examination, or, so far as is known, any of the other four or five thousand packages received by the same steamer. Yet there was no more ground for believing this package to be dangerous than any of the others. That it was not legal negligence to thus handle the package, under the circumstances, is recognized by the case of *Pierce v. Winsor*, already noticed, cited by plaintiff. Says CLIFFORD, J.: “The stowage of the mate was made in the usual way, and it is not disputed it would have been proper, *if the article had been what it was supposed to be when it was received and laden on board. Want of greater care in that behalf is not a fault, because the master had no knowledge, or means of knowledge, that the article required any extra care or attention beyond what is usual in respect to other goods.*” 2 Cliff. 27.

These observations precisely fit the circumstances under consideration.

This being the case, there was, in my judgment, no negligence under the circumstances—nothing that the law deems negligence, and there was no liability to strangers for the consequences of the unfortunate accident. If defendants are liable under the circumstances, I do not perceive why they would not have been liable if they had made careful inquiry, and had been solemnly assured that the case contained olive or sweet oil, or some other harmless merchandise, and had relied on that assurance. To hold them liable upon the case supposed would be unreasonable, and abhorrent to

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all ideas of justice. I think that, while the defendants will be obliged to bear the loss sustained by themselves, resulting from the deplorable accident, except so far as they may have a remedy against the guilty shipper, the plaintiff, also, will be compelled to submit to the loss sustained by him from the same lamentable cause. It is one of those misfortunes which are liable to occur in human affairs, wherein those upon whom the consequences chance to fall must be the ones to suffer, unless they can find a remedy against those who are really culpable.

The plaintiff also insists, *firstly*—that the accident is of a class where the event itself makes out a *prima facie* case of negligence, and throws the burden of proving due care and circumspection on the defendants; and *secondly*—that every man is presumed to do his duty and conform to the law: that under this rule it must be presumed that the shipper in this instance performed his duty, and informed defendants of the dangerous character of the article, and that, although it required the proof of a negative, the burden of showing want of knowledge was thrown upon them.

I am not prepared to admit the correctness of at least the first proposition, whatever may be the rule as to the second. But under the view I take of the evidence, it is wholly unnecessary to controvert either position; for, conceding them to be correct, in my judgment the evidence on both points clearly overthrows the assumed presumption in favor of the plaintiff, and shows that there was no negligence on the part of the defendants, or their servants, and that the dangerous character of the package was not communicated to them, and that there was nothing to excite even the suspicion of a reasonable man. The package was received when accepted by the freight-measurer, O'Leary, and the tally clerk, Middlebrook, in the mode stated in the findings, and from that time it went into the great

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mass of freight, and no further special notice was taken of it. The receipt given by Middlebrook, although but a temporary receipt, was the original receipt, from which all subsequent ones were made up. The general receipt, way bill, and bill of lading clerks made out their papers from this, without seeing or inspecting, or having any opportunity to inspect the merchandise. This receipt was their only guide. And proof of all that took place at the time of the delivery was given.

It is sometimes necessary to prove a negative, although from the nature of things this is usually difficult, and for this reason plenary proof of a negative is not always expected, or required. 1 *Greenl. Ev.* § 78; *Kohler v. Wells*, 26 *Cal.* 611-12. But in this case, the proof on those points is, to my mind, full and entirely satisfactory.

Fully impressed with the importance of this case, both in view of the large amount of damages claimed, and of the important principle involved applicable to many other actions, which, I am informed, are pending in this State and elsewhere, arising out of the same and other similar accidents, I have given to it such thought and attention as my onerous duties have allowed me to bestow; and the conclusion to which my mind is brought is, that the defendants are liable for the injuries to the premises demised to and occupied by themselves, but are not liable for the injuries resulting to the premises occupied by Bell and the Union Club. This is the first case decided, so far as I am informed, arising out of these accidents, involving the points now determined. And no case involving the exact point has been brought to my attention. Should it turn out that my conclusion is wrong, I am glad to know that there is a tribunal which can and will correct my error. I have taken care to frame the findings in such a way that, if I have erred in my legal conclusions in either branch of the case, the appellate court will have

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the means of correcting the error by directing the proper judgment upon the facts found, without ordering a new trial.

As to the premises occupied by Wells, Fargo, & Co., the statute provides that, in an action for waste, "there *may* be judgment for triple damages." *Prac. Act*, § 250. As I understand this provision, it leaves the question as to whether the damage shall be tripled to the sound discretion of the court, to be determined according to the greater or less aggravating character of the circumstances. There are no circumstances in this case to justify inflicting damages beyond the actual amount sustained. In point of fact, the defendants repaired a large portion of the premises to the satisfaction of the plaintiff, and paid the expenses themselves, and supposed they had done so as to the whole ; but it turns out in the evidence that a small portion of the expense of repairs, which, from the nature of the case, could not well be made except in connection with repairs made to other premises which defendants, according to the view taken, are not liable to repair, have been overlooked, and accordingly not been paid. For this amount the plaintiff must have judgment.

Let judgment be entered for the plaintiff for the sum of one thousand seven hundred and eighty-seven dollars and sixty-two cents, and interest at ten per cent. per annum, from August 1, 1886, in gold coin, and costs of suit.

Judgment accordingly.

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MANUFACTURERS' NATIONAL BANK v.  
BAACK.

*Circuit Court, Second Circuit; Southern District of  
New York, January T., 1871.*

NATIONAL BANKS.—POWER TO SUE.

A national bank, organized and located in one State, may bring an action in the circuit court sitting within another State, against a citizen of the latter State.

For the purpose of sustaining such a power to sue, it may be presumed that the individual members of the national bank are citizens of the State wherein the bank is located, within the meaning of Art. III. § 2 of the Constitution, and section 4 of the Judiciary Act of 1789.

Application for an injunction and receiver.

*Francis C. Barlow*, for the motion.

*C. A. Seward* and *P. C. Talman*, opposed.

BLATCHFORD, J.—The bill in this case describes the plaintiffs as “The Manufacturers’ National Bank of Chicago, Illinois, a banking corporation, incorporated and existing under and by virtue of an act of the Congress of the United States, entitled “An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, approved June 3, 1864, and having capacity to sue by the above title, and a citizen of the State of Illinois, and located and residing and doing business in the city of Chicago, in said State.” It describes the defendants as citizens of the State of New York. The allegations of the bill as to the incorporation and location of the plaintiffs are admitted by

stipulation. The plaintiffs move for an injunction, and the appointment of a receiver in the case ; and the question arises whether, on the allegations of the bill thus admitted, with the fact that the allegation of the bill as to the citizenship of the defendants is not denied by the answers, this court has jurisdiction of the suit.

The eighth section of the act of June 3, 1864, 13 *Stat. at L.* 101, under which the plaintiffs are incorporated, provides, that every association formed pursuant to the provisions of the act shall be a body corporate, and may have a corporate seal, and shall have succession by the name designated in its organization certificate, and may, by such name, "sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." The effect of this provision is not to give to the corporation the right to sue, or the capacity to be sued, in every court within the United States, whether State or Federal, or to give to every such court jurisdiction over every suit which may be brought in it, wherein the corporation is plaintiff or defendant. Its only proper effect is to provide that the corporation, when it has come or been brought as a suitor into a court which has jurisdiction of the suit, shall stand in court, in all respects, in the same position, as regards its own rights, or the rights of others against it, as to the subject matter of the suit, in which a natural person who is a suitor in such court can stand. The question as to the proper court in which the suit is to be brought, in respect of jurisdiction, is left to be determined by other provisions of law. If a natural person had brought this suit in this court against the defendants, as citizens of New York, he would have been obliged to aver himself to be a citizen of some State other than New York,—the bill being what is known as a creditor's bill, founded on a judgment at law and praying for equitable relief. There-

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fore, so far as the provisions of section 8 of the act are concerned, the plaintiffs must show, by the averments of their bill, jurisdiction of this suit by this court, by showing proper citizenship in the parties.

There is no other provision of the act which can be cited as giving to this court jurisdiction of this suit. Section 57, even if, under the dictum of Mr. Justice SWAYNE, in *Kennedy v. Gibson*, 8 *Wall.* 498, 506, it be held to refer to suits by national banks as well as to suits against them, relates only to suits to be brought in courts of the United States held within the district in which the bank is established, and does not affect the question of the jurisdiction of this court in this suit. Such jurisdiction, in order to be sustained, must, therefore, appear, by the averments of the bill, to be brought within that provision of the section 11 of the Judiciary Act of September 24, 1789, 1 *Stat. at L.* 78, which gives to this court original cognizance of all suits of a civil nature in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the suit is between a citizen of the State where the suit is brought and a citizen of another State.

The averment in the bill that the plaintiff corporation is a citizen of the State of Illinois, is, in and of itself, not sufficient to show jurisdiction, as a corporation cannot be a citizen of a State, in the sense in which that word is used in the Constitution of the United States. *Lafayette Ins. Co. v. French*, 18 *How.* 404; *Covington Drawbridge Co. v. Shepherd*, 20 *Id.* 227, 233, 234. The substance of the averments in the bill in regard to the *status* of the plaintiffs is, that they are a banking corporation, incorporated under the act of Congress named; that their members are authorized to sue by the title given to the corporation; that the corporation is located and does business at Chicago, in the State of Illinois; and that, therefore, the real plaintiffs,

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the members of the corporation, must be regarded, on such averments, as citizens of the State of Illinois.

The various decisions of the supreme court, in cases of suits in the Federal courts by and against corporations created by the laws of the States, where the jurisdiction depended on the citizenship of the parties to the suit, are reviewed in the opinion given by that court, in the case of *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 *Black*, 286. The law is there stated to be settled, that where a corporation is created by the laws of a State, the legal presumption is that its members are citizens of such State; that a suit by or against such corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporation; and that no averment or evidence to the contrary is admissible, for the purpose of withdrawing the suit from the jurisdiction of a court of the United States. In the case of *Cowles v. Mercer County*, 7 *Wall*. 118, 121, the rule is thus stated: "A corporation created by the laws of a State, and having its place of business within that State, must, for the purposes of suit, be regarded as a citizen, within the meaning of the Constitution giving jurisdiction founded upon citizenship." This rule, however, does not, *ex vi termini*, cover the case of a corporation created by act of Congress.

The argument urged against a jurisdiction in this case drawn from citizenship, is that, as the corporation is created by the United States, the only legal presumption that can be drawn is, that its members are citizens of the United States; and that there is no presumption that they are citizens of the State in which the corporation is located.

With a view to the consideration of the question raised, it will be necessary to examine the statutory provisions in respect to the location of banking associations. Section 6 of the act of 1864 provides, that

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the organization certificate of every association for carrying on the business of banking, formed under the act (and which, by the execution of such certificate, becomes, under section 8, a body corporate), shall specify the place where the operations of discount and deposit of the association are to be carried on, designating the State, Territory, or district, and also the particular county and city, town, or village. Section 44 provides, that any bank incorporated or organized under a law of a State may, by authority of such act of Congress, become a national association under the provisions of such act, by the name prescribed in an organization certificate, such as is required by such act, to be executed by a majority of its directors, the certificate declaring that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and "to change and convert the said bank or banking institution into a national association under this act," and that, on a compliance with certain provisions prescribed in that section, the association shall be held and regarded as an association under the act. There is, therefore, no difference, in regard to its *status*, between an association formed under the act, and one converted into a national association under the act. In each case, it must be regarded as holding its corporate existence under and by virtue of the act.

What, then, are the consequences of the fixing of place provided for in section 6? Section 8 provides, that the usual business of the association shall be transacted at an office or banking-house "located" at the place specified in its organization certificate. Section 9 provides, that at least three-fourths of the directors shall have resided in the State in which the association is "located" one year next preceding their election as directors, and be residents of the same during their continuance in office. Sections 10, 15, 18 and 42 speak of

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the association as being "located" in a city, town, or county. Section 30 speaks of the laws of the State where the bank is "located." Section 34 speaks of the place where the association is "established." Section 41 speaks of taxes imposed "by or under State authority, at the place where such bank is located." The word "place," in this section 41, is declared by the act of February 10, 1868, 15 *Stat. at L.* 34, to mean "the State within which the bank is located." This act of 1868 also provides, that the legislature of each State may determine and direct the manner and place of taxing all the shares of the national banks "located" within said State, and that the shares of any national bank, owned by non-residents of any State, shall be taxed in the city or town where such bank is "located." Section 50 of the act of 1864 provides, that an association may apply to the "nearest" circuit, or district, or territorial court of the United States, in certain cases, to enjoin the comptroller of the currency. Section 57 provides, that suits, actions, and proceedings against any association under the act, may be had in any circuit, district, or territorial court of the United States, held within the district in which the association may be "established," or in any State, county, or municipal court in the county or city in which the association is "located," having jurisdiction in similar cases, provided that all proceedings to enjoin the comptroller under the act shall be had in a circuit, district, or territorial court of the United States held in the district in which the association is "located."

Section 21 of the act of 1864, as amended by the act of March 3, 1865, 13 *Stat. at L.* 498, provides, that of the three hundred millions of dollars of circulating notes authorized to be issued, one hundred and fifty millions of dollars shall be apportioned to associations in the States, in the District of Columbia, and in the Territories, according to representative population,

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and that the remainder shall be apportioned by the secretary of the treasury among associations formed in the several States, in the District of Columbia, and in the Territories, having due regard to the existing banking capital, resources, and business of such States, districts, and Territories. The act of July 12, 1870, 16 *Stat. at L.* 251, § 1, provides, that fifty-four millions of dollars, in notes for circulation, may be issued to national banking associations, in addition to the three hundred millions of dollars, and shall be furnished to banking associations organized or to be organized in those States and Territories having less than their proportion under the apportionment contemplated by the act of 1865, before referred to; and that a new apportionment of such increased circulation shall be made as soon as practicable, based upon the census of 1870. Section 6 of the act of 1870 provides for "a more equitable distribution" of the national banking currency, by withdrawing circulating notes from banking associations organized in States having a circulation exceeding that provided for by the act of 1865, and issuing a like amount of notes to banking associations organized in States and Territories having less than their proportion, the intention being, as declared by the section, that "the circulation so withdrawn shall be distributed among the States and Territories having less than their proportion, so as to equalize the same." Section 7 of the act of 1870 provides that, after January 12, 1871, any banking association "located" in any State having more than its proportion of circulation, may be removed to any State having less than its proportion of circulation, under such rules and regulations as the comptroller of the currency, with the approval of the secretary of the treasury, may require.

It is quite apparent, from all these statutory provisions, that Congress regards a national banking association as being "located" at the place specified, in its

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organization certificate. If such place is a place in a State, the association is located in that State. It is, indeed, located but at one place in the State; but, when it is so located, it is regarded as located in the State. The requirement that at least three-fourths of the directors of the association shall be residents, during their continuance in office, in the State in which the association is located, especially indicates an intention on the part of Congress to regard the association as belonging to such State. Three-fourths of the legal representatives of the unknown associates forming the corporation, with which representatives any person dealing with the corporation must deal, are required to reside in the State where the corporation is "located." The reasons, so forcibly stated in the opinion of the court in the case of *Marshall v. Baltimore & Ohio R. R. Co.*, 21 How. 314, 326-329, why a grant of power, by competent authority, to certain associated persons to act by representatives, and to sue and be sued in a collective or corporate name, should not be allowed to prejudice any right of those dealing with such persons, apply as fully to the case of a bank created by Federal authority, and located in a particular State, as to one created by State authority and located in the State which created it. The view taken by the court in that case was, that the persons using the corporate name of a corporation created by a State may be justly presumed to be resident in the State which is the necessary *habitat* of the corporation; that the presumption arising from the *habitat* of a corporation created by a State in the place of its creation, is conclusive as to the residence or citizenship of those who use the corporate name, and exercise the faculties conferred by it; that the right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers,

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and the combined wealth wielded by corporations in almost every State ; and that it is of importance, also, to corporations themselves, that they should enjoy the same privileges in other States, where local prejudices or jealousy might injuriously affect them. The principle has been settled ever since the case of *Louisville R. R. Co. v. Letson*, 2 *How.* 497, that where a corporation is created by the laws of a State, the legal presumption is that its members are citizens of such State. Where a corporation is created by competent authority—authority as competent, within a given State, to create such corporation, and to locate it in such State, as is the State itself—and a location and *habitat* within such State, and not elsewhere, is given by the creating authority to such corporation, there is no reason why the legal presumption should not be, that the members of such corporation are citizens of such State, within the meaning of section II. of article III. of the Constitution, and of section 11 of the Judiciary Act of 1789. The presumption, in the case of a corporation created by a State, is only arrived at by presuming the members of the corporation to be citizens of the United States and to be residents in the State, and, therefore, under the decision in *Gassies v. Ballou*, 6 *Pet.* 761, citizens of the State. The members of a corporation created by the United States, and located in a particular State, in the manner and to the extent in which national banking associations are located in particular States, may as properly be presumed to be citizens of the United States and residents in the State where the corporation is located, so as thereby to be citizens of such State, as the members of a corporation created by a State may be presumed to be citizens of the United States, and residents in the State creating it and in which it is located, and, therefore, citizens of such State.

But it is urged, that the legislation of Congress

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shows an intention not to confer upon national banking associations the right to sue in the Federal courts. The first national banking law was passed February 25, 1863, 12 *Stat. at L.* 665, and was repealed by section 62 of the act of June 3, 1864. Section 59 of the act of 1863 provided, that "suits, actions, and proceedings by and against any association under this act may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established." The corresponding section, 57, of the act of 1864, provides, that "suits, actions, and proceedings against any association under this act may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." It is urged that this legislation indicates an intention that national banking associations shall not come into the Federal courts as plaintiffs, although they may be brought into those courts as defendants. But, independently of the view taken of section 57 of the act of 1864, in the opinion given by Mr. Justice SWAYNE in the case of *Kennedy v. Gibson* (before cited), it may well be said, that the object of such section is to enable a suit to be brought against a bank in any Federal court held in the district where the bank is established, without reference to the citizenship of the plaintiff in the suit. Under the decision in the case of *Osborn v. Bank of the United States*, 9 *Wheat.* 738, such a suit is a case arising under a law of the United States, within the meaning of the Constitution, the bank being incorporated by a law of the United States; and it is competent for Congress to confer jurisdiction over it on the Federal courts. But the jurisdiction is expressly confined, by section 57, to suits brought in a Federal court held in the district where the association

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is established. Under it, however, these plaintiffs, a national bank, could bring a suit in this court against a national bank established in this district. The section embraces any plaintiff who has capacity to sue at all in any court. If these plaintiffs can sue another national bank in this court, it is difficult to see why they should not be allowed to sue in this court defendants who are citizens of New York. I can perceive no evidence, in the legislation referred to, that Congress intended that this court should not assume the jurisdiction invoked in this suit.

So, too, the provision in section 2 of the act of July 27, 1868, 15 *Stat. at L.* 227, withholding from banking corporations organized under a law of the United States the privilege conferred by that act on other corporations organized under a law of the United States of removing into a federal court certain suits brought against it, cannot be regarded as affecting the question of original jurisdiction involved in this case.

I am, therefore, satisfied, that the averments of the bill are sufficient to show jurisdiction, and that this court has jurisdiction of this suit.

On the merits, the plaintiffs are entitled to the receivership and the injunction asked for in their notice of motions, so far as concerns the property specified in the first and second clauses of such notice; but, inasmuch as such property exceeds the amount of the plaintiffs' claim, the receiverships and injunction will be discharged on furnishing to the plaintiffs satisfactory security for the payment of their claim, if they shall recover in the suit.

An order will be settled on notice, embodying proper provisions.

## SILVERMAN'S CASE.

*District Court; District of Oregon, November T., 1870.*CONSTITUTIONAL LAW.—ACTS OF BANKRUPTCY.—  
PLEADING.

The constitutional grant of power to Congress, to establish uniform laws on the subject of bankruptcy, is not limited to passing enactments similar in scope and operation to those in force in England, when the Constitution was adopted. It gives Congress plenary power over the subject of bankruptcy; under one limitation only, that the laws passed upon that subject shall be uniform throughout the United States.

The reasons why this power should be vested in the national government,—explained.

Under the Constitution any and all uniform legislation, tending to promote the distribution of an insolvent debtor's assets among his creditors, and his discharge from their demands, is within the power of Congress.

The wisdom and soundness of the policy of allowing insolvent debtors to dictate preferences in the distribution of their assets,—questioned.

In the district court, sitting as a court of bankruptcy, pleadings must be special. Hence, a mere general denial of the intent with which an act relied upon as an act of bankruptcy is alleged to have been done, is not a good defense to the charge: but the respondent must also allege and prove with what intent he did such act.

When the unlawful intent is the necessary consequence of the act charged, as in the case of a payment of one creditor by an insolvent debtor, a mere denial of such intent is no answer to the petition, and judgment may be given against the respondent as upon a failure to answer.

Inasmuch as every man is presumed to intend the necessary consequences of his acts, a debtor who has paid one creditor to the exclusion of others, cannot be heard to say that he did not intend to give such creditor a preference. The necessary effect of such payment is, to give a preference. Judgment may be given against a respondent whose answer sets up no other matter of defense than the denial of the intent, as upon failure to answer.

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Petition in involuntary bankruptcy.

*Mr. Fechheimer*, for the petition.

*Mr. Stout*, opposed.

DEADY, J.—On December 7, 1870, Livingston and Levy, doing business as the firm of Livingston & Co., at San Francisco, filed a petition in bankruptcy against Charles A. Silverman, praying that he might be adjudged a bankrupt.

It appears from the petition that the debt due from Silverman to the petitioner amounts to five hundred and thirty-one dollars and fifty cents, for goods sold and delivered to Silverman in February, 1869, and that Silverman has since committed the following acts in bankruptcy :

*First.* That on or about November 15, 1870, Silverman sold and transferred his property to certain persons, to wit : an undivided one-fourth of the property and effects of the Oregon Dray Co., with intent to thereby hinder, delay, and defraud his creditors ; and with the intent to delay and defeat the bankrupt act.

*Second.* That on or about November 16, 1870, Silverman being insolvent, paid Wasserman & Co., one of his creditors, the sum of one hundred dollars, with intent to thereby give a preference to Wasserman & Co.

On December 16, 1870, Silverman answered the petition, denying that he sold his property or made the payment to Wasserman & Co., *with the intent* in the petition alleged.

On the same day the petitioner filed a motion for judgment on the pleadings, upon the ground that the answer of Silverman in fact admitted the acts of bankruptcy charged in the petition ; and on December 28 the motion was argued and submitted.

Upon the argument, counsel for the debtor confidently asserted that Congress had no power to pass a

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bankrupt law applicable to other persons than traders, and that an insolvent person had a natural right to dispose of his effects as he chose, and by such disposition to prefer one creditor to another. Counsel cited no authority in support of the objection to the constitutionality of the act, but maintained generally that the power of Congress in the premises was limited to the passing of such bankrupt acts as were in force in England at the time of the formation and adoption of the Constitution, and that these did not apply to any one except traders.

The Constitution, Art. I, § 8, provides: "The Congress shall have power . . . to establish . . . *uniform laws on the subject of bankruptcies* throughout the United States."

If language means anything, this is something more than the power to re-enact the particular bankrupt act then in force in Great Britain. It is a grant of plenary power over the "subject of bankruptcies." Now the *subject of bankruptcies* includes the distribution of the property of the fraudulent or insolvent debtor among his creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends. Congress is given full power over this *subject*, with the one qualification, that its laws thereon shall be uniform throughout the United States. Whether these laws shall apply to *all* fraudulent or insolvent debtors or only to such as are engaged in trade, is committed by the Constitution to the wisdom and discretion of the law-making power. This may be illustrated by reference to the clause in the section above quoted whereby the Constitution gives Congress power "to establish post-offices and post-roads."

Is this to be considered a plenary grant of power over the *subject* of the collection, conveyance, and de-

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livery of all such letters, newspapers, and other things, as in the progress of society it may be found useful and convenient to transmit from place to place by public post; or does it merely authorize Congress to establish and maintain such a meagre and primitive postal system as was then established in Great Britain by act of Parliament? It seems to me it is only necessary to state the latter conclusion or proposition, to show its absurdity.

If the power to establish post-offices and post-roads is not full power over the subject, to be exercised from time to time, according to the varying demands and necessities of society, then it is clear, upon the argument against the Bankrupt Act, that carrying the mail by steam, carrying it by railway, transmitting books through it, and dispatching it daily, are all unconstitutional, for the system in force in England at the adoption of the Constitution provided for none of these things.

In *Re Klein*, decided in the circuit court for the district of Missouri, and reported in 1 *How.* 277, Mr. Justice CATRON held the Bankrupt Act of 1841, which was not restricted to traders, to be constitutional. In that case, the objection to the act was two-fold: *First*. That it allowed the debtor to avail himself of the benefit of the act upon his own petition; and, *Second*. That it was not restricted to traders—contrary in both particulars to the provisions of the English act. In considering these objections, the learned judge said:

“If the power conferred on Congress carries with it these restrictions, then the district court properly refused to discharge the applicant, Klein, because the act of Congress was unconstitutional in his case. But other and controlling considerations enter into the construction of the power; it is general and unlimited; it gives the unrestricted authority to Congress over the whole subject, as the Parliament of Great Britain had it, and

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as the sovereign States of this Union had it before the time when the Constitution was adopted. . . .

“The district court relied confidently on the ground, that Congress can pass no law violating contracts ; and that the clause of the Constitution conferred no such authority, because the English bankrupt laws, by which the power is supposed to be restricted, only permitted the contract to be annulled at the election of four parts in five of the creditors in number and value ; and therefore, they annulled it by a new contract. This argument proceeds on the assumption, that a proceeding in bankruptcy can only be had at the election of and for the benefit of creditors ; and that every material step is their joint act ; to which the debtor is compelled to submit. For the present it will only be necessary to say, that one prominent reason why the power is given to Congress, was to secure to the people of the United States, as one people, a uniform law, by which a debtor might be discharged from the obligation of his contracts, and his future acquisitions exempted from his previous engagements ; that the rights of debtor and creditor equally entered into the minds of the framers of the Constitution. The great object was to deprive the States of the dangerous power to abolish debts. Few provisions in the Constitution have had more beneficial consequences than this, and the kindred inhibition on the States, that they should pass no law impairing the obligations of contracts.

“The inhabitants of States producing largely, must be creditors ; the inhabitants of those that are consumers, will be debtors. Bankrupt laws of the latter States might ruin the producers and creditors. They having no interest or power in the government of the consuming States, and it being the interest of the latter to annul the debts of non-residents, no remedy would exist for the grossest oppression. No laws of relief would be more effectual in time of pressure by foreign creditors,

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nor more likely to be adopted. If one State adopted such a measure, it would furnish a fair occasion for others to do the same, on the plausible pretext of self-defense; others would be forced into a similar bad policy, until discredit and ruin would overspread the entire land, by an extinction of all debts, and a consequent prostration of morals, public and private, on the subject of contracts. This evil had, to a certain extent, occurred, and was fresh in the minds of the framers of the Constitution; and no doubt it would again occur in some of the States but for the provisions under consideration standing in the way of abrogating the private contracts of non-residents.

“But if Congress passed the law, it must be uniform throughout the United States; then the entire people are equally represented, and have the power to protect themselves against hasty and mistaken legislation, by its repeal, if found oppressive in practice. . . .

“In considering the question before me, I have not pretended to give a definition; but purposely avoided any attempt to define the mere word bankruptcy. It is employed in the Constitution in the plural, and as a part of an expression—“the subject of bankruptcies.” The ideas attached to the word in this connection are numerous and complicated; they form a subject of extensive and complicated legislation; of this subject Congress has general jurisdiction, and the true inquiry is—to what limits is that jurisdiction restricted? I hold, it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit; its greatest is the discharge of a debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.

“With the policy of a law letting in all classes—

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others as well as traders—and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern ; it belongs to the law-makers.

The natural right of an insolvent to dispose of his property as he chooses, is not exactly pertinent to the question before the court ; but as counsel seem disposed to attach some importance to the claim, and made it the basis of an indirect attack upon the justice and policy of the act, if not its constitutionality, it may be well to inquire if there is any such right. Whence comes the property of an insolvent ? A moment's reflection will satisfy any one that it represents in whole or in part the credit given to the insolvent by his creditors, and therefore, in good morals, belongs to them, and not him. Strictly and truthfully speaking, an insolvent has no property, and therefore, he has no *natural* right to dispose of the property in his possession otherwise than with the consent of the real owners—his creditors.

I know that, after a series of conflicting decisions, it was established at common law, that a debtor in failing circumstances might prefer a creditor. But the doctrine and practice were never regarded as consonant with good morals, and by the intervention of the legislature in the enactment of bankrupt and insolvent laws, the contrary rule has been generally established. In *Cunningham v. Freeborn*, 11 *Wend.* 256, Mr. Justice NELSON, upon this subject, and the kindred one of voluntary assignments, says :

“ The root of the vice in all these cases of voluntary assignments by failing debtors lies in the principle of preference. It affords the pretense for putting the property into the possession of a friendly trustee, and thereby may substantially secure to the debtor the control of it for a long time after the law presumes it to have passed from him. and when his own possession

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would be incompatible with its security. In *Estuick v. Cailland*, 4 *Term*, 424, Lord KENYON said, that 'it was neither illegal or immoral to prefer one kind of creditors to another.' The soundness of this proposition loses some of its weight, when advanced in a case one would be apt to select above all others to illustrate the reverse; but I can well imagine one that would justify it. As a general proposition, however, the experience and observation of mankind must bear witness against it; and no one knew better than his lordship, and those familiar with courts of justice, how frequently the principle is perverted and made subservient to the gratification of vindictive feelings and the foulest ingratitude, as well as injustice towards honest and confiding creditors."

The answer of the debtor impliedly admits the indebtedness and insolvency as alleged in the petition, as well as the debtor's property and the payment of one of his creditors, and simply denies that such sale or payment was made with the intent to defraud or prefer.

Counsel for petitioner, assuming that these denials, or some of them, are mere traverses of conclusions of law from the facts admitted, asks that they be disregarded, and that judgment be given against the debtor notwithstanding, in accordance with the prayer of the petition.

It is a well settled rule of pleading that a traverse or denial must not be taken on a mere matter or conclusion of law, for the effect would be to submit the question of law to the jury rather than the court. But when the conclusion is a mixed one of law and fact, then it is clearly traversable, and the issue raised thereby triable by a jury under the directions of the court as to the law. 1 *Chitty Pl.* 645; 2 *Estee Pl.* 660. But under Rule 36 of this court, which provides that "all pleadings and allegations of fact shall be special and veri-

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fied," a simple denial of the intent alleged in the petition is not, in any case, a sufficient defense thereto.

If the debtor, notwithstanding the admitted circumstances, did not sell his property, or make the payment complained of, with the intent alleged by the petitioner, he should state with what other intent he did make such sale or payment. By this means the petitioner will be apprised of what the particular defense is, and come prepared to meet it at the trial, or if he thinks it insufficient in law he may demur to it. In this way much unnecessary trouble, vexation, delay, and expense is saved to both parties. For instance, if such were the fact, the debtor might allege in his answer that he sold his property as in the petition alleged, for the purpose and with the intent of investing the proceeds in real property in Portland, or for the purpose of loaning the sum on note and mortgage, or investing it in the public funds, as he might lawfully do, and not with the intent to thereby hinder, delay, and defraud his creditors, as alleged in said petition.

The sale of his property by a debtor is not necessarily an act of bankruptcy. It depends upon the intent with which it is done, and as this intent is not a mere conclusion of law, but of law and fact compounded, it may be traversed or denied, and the matter tried by a jury under the direction of the court as to the law. Yet it is probable that the act should be so construed as to hold any disposition of a debtor's property to be, *prima facie*, fraudulent, and contrary to the act, and thereby put the burden of proof upon the debtor to show that the same was done with a lawful intent, and is therefore not an act of bankruptcy. Such, at least, seems to be the necessary effect of the provision in section 41, which in terms declares, that upon the trial of a petition in involuntary bankruptcy the debtor shall be adjudged a bankrupt, unless he proves the facts set forth in the petition not to be true.

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But, as has been shown, under the rules of this court a mere general denial of the intent with which Silverman is alleged to have sold his property is not a sufficient plea, but the same must not only traverse the intent alleged, but must state with what other intent it was in fact done. Still I think that when the act is indifferent — not necessarily unlawful, contrary to the statute—that a general denial of the unlawful intent alleged is sufficient to raise an issue and prevent the petitioner from having judgment on the pleadings as for want of an answer. The defect in the answer should be taken advantage of by demurrer. But if the parties choose to go to trial upon such a plea, proof of a lawful intent can be made under it.

So far, then, as the first act of bankruptcy alleged is concerned, the motion must be denied.

As to the payment of the one hundred dollars to the creditor of Silverman, I am satisfied, upon the facts admitted, that he must be conclusively presumed to have intended to give such creditor a preference. The necessary effect of such payment is to give a preference. I cannot conceive of any circumstances under which an insolvent debtor can make a payment to one of his creditors without intending to thereby prefer such creditor, unless it be when the debtor is ignorant at the time of his insolvency. In this case the debtor admits that he was insolvent at the time he made this payment, and there is no pretense that he was not aware of it. Indeed, he is presumed to know it until the contrary appears. Under these circumstances, a mere denial of the intent to give a preference is a traverse of a conclusive presumption of law, and therefore frivolous and immaterial.

In *Cunningham v. Freeborn*, cited above, it was alleged in the bill that a certain voluntary assignment was made with a fraudulent intent. The answer of the defendant admitted the assignment, but denied the in-

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tent. The case was heard on bill and answer, and in the course of the opinion, the court held that the admission of facts which are *per se* fraudulent in judgment of law, "are as much so and as conclusive upon the defendant as if he had in express terms admitted a fraudulent intent in his answer; and, in such case, any subsequent disclaimer of such intent will not avail him."

In *Re Drummond*, 1 *Bankr. Reg.* 11, it was held that a payment by an insolvent debtor to one of his creditors necessarily gave such creditor a preference, and that the debtor, being presumed to know the consequence of such act, was conclusively presumed to have intended it.

In *Driggs v. Moore*, 1 *Abb. U. S.* 440, there was a similar ruling. The syllabus states the conclusion of the court, in these words: "If, from the circumstances under which the mortgage was given, it must necessarily have operated as a preference, the creditor will not be heard to say, in support of the transaction, that the debtor did not intend to create one."

In *Campbell v. Trader's Bank*, 3 *Bankr. Reg.* 124, H. & E., being insolvent, gave their note, with a warrant to confess judgment thereon, in settlement of a debt due the Trader's Bank. DRUMMOND, J., held, that H. & E. must have intended to give a preference to the bank. In the course of the opinion he says: "It is to no purpose that a man says, when he is insolvent, and signs a note and warrant of attorney, and gives it to his creditor, the effect of which is to enable a creditor to enter up judgment, and issue execution, and levy on his property, that he did not intend to give a preference. Actions in this, as in so many other cases, speak louder than words; and the conclusion necessarily follows, from such a state of facts, that he does intend to do what is the reasonable consequence of what he does, or, according to the oft-repeated statement of the

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books, a man is supposed to know what is the necessary consequence of his own acts."

In *Re Smith*, 3 *Bankr. Reg.* 98, among other things, the petition alleged that Smith, being insolvent, made a voluntary general assignment of his property for the benefit of all his creditors, with the intent to defraud or delay the operation of the Bankrupt Act, and to prevent his property from being distributed according to the provisions of said act. In answer to this allegation, the respondent pleaded, that such assignment was made without preference, for the sole purpose of having his creditors share equally his property, in proportion to their debts, and not with the intent alleged in the petition. The petitioner moved for judgment on the pleadings, and the motion was allowed. HALL, J., in the course of his opinion, after demonstrating that such an assignment, if upheld, would necessarily and absolutely defeat the operation of the Bankrupt Act, says: "There can be no possible doubt that the execution of the general assignment, under the circumstances of this case, was an act of bankruptcy; and the only question upon which there can be the slightest doubt is, whether, in the absence of any rebutting proof—and even in the absence of a replication to the respondent's answer—the denial of the intention imputed to him, and which is necessary to constitute the act of bankruptcy, must not prevent an adjudication until the question of intention has been submitted to a jury."

Every person of a sound mind is presumed to intend the necessary, natural, or legal consequences of his deliberate act. This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention. And when, by law, the consequence must necessarily follow the act done, the presumption is ordinarily conclusive, and cannot be rebutted by any evidence of want of such

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Silverman's Case.

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intention. See, also, *Re Sutherland*, 1 *Bankr. Reg.* 140, decided in this court.

In opposition to these cases, no authority is cited by counsel for respondent. He rests his case upon the narrow ground, that because *the intent to prefer* is a necessary ingredient in the act of bankruptcy, it may be denied, and tried as an issue of fact. But this assumes that the presumption which the law makes from the facts admitted—namely, that a preference was intended—is only a disputable presumption, and may therefore be controverted. If, however, the preference is a *necessary* consequence of the payment, the law *conclusively* presumes the intent to prefer. This position is correct beyond a doubt, upon both reason and authority. Now, that the giving of a preference is a necessary consequence of the payment by an insolvent debtor of one of his creditors, is self-evident. Argument cannot make the matter plainer than the statement of the proposition. The creditor is preferred, because he has received his debt and his fellow-creditors have not. The debtor, being insolvent, has not the means to pay them, and by paying one in full,\* he has defrauded the others of their just proportion of his estate. Other motives may also have actuated the debtor, but that makes the payment none the less a preference. Indeed, he may expect to become able in time to pay all his creditors in full, and may intend to do so as soon as he can, but this does not affect the question. The creditor whose debt is paid is nevertheless preferred over his fellows. He has his money, but they must depend upon the often *double* uncertainty of whether their debtor will in time become *both* able and willing to pay their debts in full.

Notwithstanding the length of this opinion, I cannot omit to notice the oft-repeated declaration of counsel for respondent that proceedings in bankruptcy are *quasi* criminal, and must be strictly construed in favor of the

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respondent. If any part of the act should be so construed, it is section 39, which provides for involuntary adjudication.

In *Re Locke*, 2 *Bankr. Reg.* 123, LOWELL, J., in speaking of this section, says:—"It is highly *remedial*, and should be construed liberally in favor of creditors, because its scope and purpose are to oblige insolvent traders to take advantage of the act, and thus insure an equal distribution of their estate under its carefully framed provisions."

In *Re Muller*, 3 *Bankr. Reg.* 86, decided in this court, in reply to a similar argument from counsel against the operations of the act, the court said: "In my judgment, this view of the matter is not supported by reason or authority. The act does not attempt to punish the bankrupt, but to distribute his property fairly and impartially between his creditors, *to whom in justice it belongs*. It is *remedial*, and seeks to protect the honest creditor from being overreached and defrauded by the unscrupulous. It is intended to relieve the honest but unfortunate debtor from the burden of liabilities which he cannot discharge, and allow him to commence the business of life anew. The power to pass laws on 'the subject of bankruptcies' is one of the express grants of power to the national government; and history teaches that the want of a uniform law on this subject throughout the States, was one of the prominent causes which led to the assembling of the constitutional convention and consequent formation and adoption of the Federal Constitution.

"Such a statute is not to be construed strictly as if it was an obscure or special penal enactment, and this was the sixteenth instead of the nineteenth century. The act establishes a *system*, and regulates, in all their details, the relative rights and duties of debtor and creditor. Such an act must be construed—as indeed should all public acts—'according to the fair import

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of its terms, with a view to effect its objects and to promote justice.' ”

The petitioner is entitled to judgment declaring the respondent a bankrupt, on the ground of having paid Wasserman & Co., with intent to give them a preference.

Order accordingly.

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### THE H. P. BALDWIN.

*District Court; Eastern District of Michigan, June T., 1870.*

#### COLLISION.—REQUISITES OF LIBEL.

A libel for collision must state the facts constituting the fault in navigation on the ground of which damages are claimed against the vessel libeled. A mere general allegation that “she was so carelessly, negligently, unskillfully, and recklessly navigated that,” &c., is not sufficient.

#### Exceptions to libel.

The libel in this case was filed by George W. Allen and Wells Burt, against the bark H. P. Baldwin, to recover damages for a collision.

The claimants filed exceptions to the libel, for insufficiency in the statement of the cause of the collision.

*Moore & Griffin*, for libelant.

*Newberry, Pond, & Brown*, for claimants.

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LONGYEAR, J.—The libellant's vessel, the schooner Marquette, was bound on a voyage from Oswego to Chicago, and when in the Straits of Mackinaw, was collided with by the bark H. P. Baldwin. The manner and cause of the collision are stated in the third article of the libel, in the following language: "Third. That when the said schooner had so far proceeded on her said voyage, as to have reached the Straits of Mackinaw, and were off and a little above "Old Mackinaw," so called, and while running on the wind upon the port tack, with her proper watch, officers, and crew properly placed and vigilantly attentive to the care and safe navigation of their said schooner, with the proper signal lights properly placed and brightly burning, the bark H. P. Baldwin, in passing up by the starboard side, was so carelessly, negligently, unskillfully, and recklessly navigated by those in charge of her that she was made to run into, upon, and collide with the said schooner, the said bark striking the said schooner on the starboard side," &c. There are no other allegations in the libel as to the manner and cause of the collision. Articles 4 and 6 were alluded to on the argument as throwing further light upon this subject. But article 4 is confined to a statement of what efforts were made by the master and crew of the schooner to avoid the collision, and states, by way of fixing the period in the occurrences which resulted in the collision when such efforts were made, that they were made "as soon as the said bark headed towards and for the said schooner." And article 6 is the usual general allegation that the bark was solely in fault.

Is the allegation above quoted then, that the bark "was so carelessly, negligently, unskillfully, and recklessly navigated," as the cause of collision, a sufficient allegation?

There does not seem to be any well defined rule

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laid down in the books as to the degree of certainty requisite in stating the cause of collision. Mr. PARSONS says: "How these things should be stated, we can better indicate by the forms we give in the appendix than in any other way; saying now only that the demand of the libelant should be so clearly stated that the respondent may know, without any doubt, what claims he must repel. The facts should be stated, also, that they may be understood by all interested in knowing them, and the judge be able to see judicially, that they bring the case within his jurisdiction, and within the law of his court." 2 *Pars. Shipp. & Adm.* 380. On an examination of the precedents to which we are referred by Mr. PARSONS, and also of those laid down by other authors, we find that in every instance of a libel for collision resulting from carelessness, &c., it is stated wherein the carelessness, negligence, unskillfulness, or recklessness consisted. I believe this to be the only correct, practicable, and safe rule. To state that the navigation of the colliding vessel was careless, negligent, unskillful, or reckless, without stating wherein the carelessness, &c., consisted, is stating a mere conclusion. The facts should be stated so that the court may be able to see judicially that carelessness, &c., existed, and contributed to, or was the cause of the collision. I cannot see, in the application of this rule, any of the hardships contemplated by counsel for libelant in this case. It is true, the libelant cannot be presumed always to know and be able to state in his libel just what orders were given on the colliding vessel, or all that was done upon it that resulted in the manœuvres which brought about the collision, but he can state what those manœuvres were, for if he has the necessary lookout, they can be and are always seen and known on board his own vessel. If the manœuvres of the colliding vessel were such as to bring about the result when it was within the power, or it was the duty, of

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The H. P. Baldwin.

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the colliding vessel to avoid the other, then it is sufficient to state what such manœuvres were, accompanying such statements, of course, with a statement of the position, course, &c., of the respective vessels at the time such manœuvres occurred, by which the court may be able to see what was the necessary result of such manœuvres. I say such statement would be sufficient, because, if such manœuvres were in violation of the duty of the colliding vessel under the circumstances of the case, then they necessarily constitute, in and of themselves, careless, negligent, unskillful, and reckless navigation. For instance, in this case, if the colliding vessel, when in dangerous proximity to the libellant's vessel, suddenly changed her course, and the collision was thereby brought about, it would be sufficient to state that fact; or, if the two vessels were crossing, and so were within article 12 of the collision act, 13 *Stat. at L.* 60, or, if the colliding vessel was overtaking the other, and so was within article 17 of said act; and if in either of these cases the colliding vessel failed to observe the requirements of those articles, it would be sufficient to state these facts, for then the carelessness, &c., complained of would clearly appear from the facts stated.

I think the libel in this case falls far short of the necessary requisites as above indicated, in its statement of the cause of the collision. We might infer several things from the statements which are contained in the libel; but this is not sufficient in a matter of pleading. The facts must be clearly and positively stated, and not be left to inference, nor alleged by way of reference or recital merely.

The exceptions are sustained, and the libellant will be granted leave to amend his libel.

Order accordingly.

## WARE v. ST. PAUL WATER COMPANY.

*Circuit Court, Eighth Circuit; District of Minnesota, October T., 1870.*

## INJURIES TO THE PERSON.—RIGHT OF ACTION FOR NEGLIGENCE.—DAMAGES.

The liability of a person or corporation employing a contractor to construct a public work, for personal injuries sustained by a third person, through unskillful or improper means of performance, is not limited to cases where an incompetent or unsuitable person has been employed as contractor.

If a work of a kind in the ordinary doing of which a nuisance occurs, being lawfully undertaken, has been negligently or improperly prosecuted; or if it was ordered without lawful authority, however prosecuted; a third person, who has sustained injuries thereby, without fault on his own part, may recover from the employer, notwithstanding the performance was intrusted to a contractor instead of to hired laborers.

## Trial of an action by a jury.

The defendants, the St. Paul Water Company, were authorized by their charter, and by an ordinance of the city of St. Paul, to construct an aqueduct, and works connected therewith, in the streets of the city, for the purpose of supplying the inhabitants with water. They engaged with a contractor for the performance of portions of the work. The plaintiff, while driving upon a street in which the contractor and his workmen were blasting, and were using a steam drill for making trenches for pipes, was thrown from his wagon, and injured. To recover damages for the injuries, he brought this action; claiming that they

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Ware v. St. Paul Water Co.

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were attributable to the negligent manner in which the work was prosecuted.

NELSON, J., charged the jury as follows:—This action is brought against the defendant to recover damages for an injury to the plaintiff on one of the streets of the city of St. Paul. There is no doubt about the fact of the injury having been suffered by the plaintiff; both bones of his leg below the knee were broken. The right of action is claimed upon the principle, which is pretty well settled in this country, at least by the Federal courts, that where “a person (a company or corporation included), is engaged in a work, in the ordinary doing of which a nuisance necessarily occurs, the person is liable for any injury that may result to third parties from carelessness and negligence, though the work may be done by a contractor.” *City of Chicago v. Robbins*, 2 *Black*, 418; 4 *Wall*. 658; 9 *Am. Law Reg.* No. 9.

Although the plaintiff might have sustained an action against the city of St. Paul, it is his right to seek his remedy against the party who created the nuisance, and the case is not altered from this fact.

The defendant claims that it cannot be held liable for any negligence of the contractor or his employees, unless it appears that an unskillful and improper person was employed as contractor. While we admit that such a rule of law might apply in some cases, we are of the opinion that this case is not of that class.

Early in the history of cases of this character it was the well-established law, that the “owner of land was liable, at all events, for the negligence of employees in doing work, whether there was an intermediate contractor or not. Subsequent decisions restricted the application of this rule of law, until at last it was held, by very able and learned judges, that the relation of principal and agent, master and servant, must be estab-

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lished in all cases, before any responsibility could be fixed upon the person who authorized the work. The principle, however, upon which this suit is sought to be maintained, soon became an exception to this rule. The plaintiff must satisfy you, if the work was a lawful undertaking, that there was reasonable care and prudence on his part, as well as negligence on the part of the defendant. If the work was not authorized to be done, he would be required to show reasonable care for his personal safety only.

The defendant in this case, by its charter, as well as by an ordinance of the city council, was authorized to prosecute this work, in excavating, and laying water pipes through the streets. It was a public improvement necessary to be done, and though the streets were more or less obstructed in digging trenches and operating steam drills in the rock underlying the street, still the public must yield the enjoyment of a free and unobstructed passage, for such reasonable time as might be required to perfect the work. The defendant, however, cannot relieve itself from the duty of exercising care and diligence for the protection of the public, because the improvement was a necessity. It is said "necessity justifies actions that would otherwise be nuisances; yet unless prudence and care is exercised, they become nuisances, and can be abated."

It is no argument against the prosecution of this work, that it was a hazardous undertaking, and required the use of dangerous implements and material in its prosecution. But, the more hazardous the work and the more dangerous the machine used, the greater the duty of the defendant to exercise extraordinary precaution.

There was some evidence which tended to show that the plaintiff, when driving rapidly down the street in which pipe was being laid, suddenly urged his horse with the whip, and turned the corner into a side street,

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after passing all of the obstructions, and at a time when the steam drill was not in operation, and work was virtually suspended, and in so doing struck the curb, which overturned the wagon and produced the injury. If you believe that such was the fact, and that the injury did not result from the want of care on the part of the defendant, why there is an end of the case, and the plaintiff cannot recover. And if, rejecting this theory, you are satisfied that at the time of, and preceding the injury, the persons engaged in doing the work and having charge thereof, exercised the care and precaution to prevent injury to others, which ordinarily prudent persons would exercise under like circumstances, why then the plaintiff cannot recover. Or, if you are satisfied that the plaintiff did not use all the care to prevent injury, which ordinarily prudent persons would use under like circumstances, and his neglect to use such care contributed in any degree to bring the injury on himself, then the defendant is entitled to a verdict. Or, if you believe there was culpable negligence on the part of the the plaintiff, as well as on the part of the defendant, the defendant should have a verdict.

But if you believe that the negligence of those doing the work was the cause of the injury, and that the plaintiff was exercising all reasonable care for his personal safety, you will bring in a verdict for the defendant. These questions of fact are for your determination, and you must decide them according to your best judgment.

If you think that the plaintiff is entitled to recover, you will next consider what amount of damages is due him. The following general rule, which, I believe, is settled, will govern your action. The party aggrieved is entitled to recover not only actual expenses, including medical, but also a reasonable compensation for mental and bodily suffering, loss of time, and for any

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permanent or incurable injury inflicted. The damages must be strictly compensatory.

The jury found for the plaintiff.

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UNITED STATES *ex rel.* ROBERTS v. JAILER OF  
FAYETTE COUNTY.

*Circuit Court, Sixth Circuit; District of Kentucky,  
October T., 1867.*

HABEAS CORPUS.—POWERS OF DEPUTY MARSHAL.—  
HOMICIDE.

Where the return to a writ of *habeas corpus* showed that the petitioner was held in custody under a commitment regular on its face, and made by a competent court, for an act charged as an offense against the State law, but the petitioner alleged that he was really held for an act done under authority of the United States, the court, in view of the case involving a question between the State and the national government, adjourned the hearing, and required the petitioner's counsel to give notice of the adjourned day to the State district-attorney for the county.

Reasons recommending this practice,—explained.

Upon a *habeas corpus* issued under section 7 of the act of March 2, 1833, 4 Stat. at L. 634, whether the petitioner is held under State or Federal process is immaterial. If he is confined "for an act done in pursuance of a law of the United States or of a process of any judge or court thereof," he is entitled to a discharge.

A United States marshal has power to appoint a special bailiff to execute a particular process. *So held*, where the appointment in question was made within a State, the laws of which conferred that power upon sheriffs.

The duty and proper mode of proceeding, by a marshal or sheriff, or deputy of either, in making an arrest under a warrant,—explained.

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The rule is now settled that the *habeas corpus* act of March 2, 1833, gives relief to one in State custody, not only when he is held under a law of the State which seeks expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the State which applies to all persons equally, where it appears he is justified for the act done because it was done in pursuance of a law of the United States.

Where an officer, lawfully engaged in the attempt to execute process commanding an arrest, is resisted by the party to be arrested, in such manner that he is obliged to take the life of the latter in self-defense, he is justified by his process in so doing.

Hearing upon a writ of *habeas corpus*.

*Benjamin H. Bristow*, United States attorney, for the petitioner

*L. H. Noble*, opposed.

BALLARD, J.—Upon November 9 last, a petition was presented to this court on behalf of James Roberts, setting forth, in substance, that he was confined in the jail of Fayette county, for some alleged offense against the laws of the State of Kentucky, but in fact, for an act done in pursuance of a law of the United States, and of a process of a judge thereof, and praying for a writ of *habeas corpus*, to be directed to the jailer of Fayette county. The writ was issued, returnable forthwith. Within a reasonable time after the service of the writ, the jailer of Fayette county produced in court the prisoner, together with his return, in which he stated, in substance, that he held the prisoner by virtue of an order of commitment made by the Mercer circuit court.

On behalf of the prisoner, it was conceded that this commitment to prison was entirely regular on its face; that the order of commitment was made by a court of competent jurisdiction, and on account of an alleged offense against the laws of Kentucky; but it was in-

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sisted, and offered to be proven in his behalf, that though he was imprisoned for an alleged offense against the State of Kentucky, his imprisonment was really for an act done under the authority of the United States.

Although all the parties were before the court which the writ and the form of proceedings contemplated, and although it appeared that the prisoner was probably entitled to his discharge, I did not think it proper, in view of the importance of the case—involving, as it does, the grave question of a conflict of jurisdiction between the State and National courts—to make a final disposition of it. I therefore continued the further hearing of the case until November 30, and required the district-attorney, who appeared for the petitioner, to give written notice of the time, place, and nature of such hearing to the commonwealth's attorney for the county of Mercer, that being the county in which the offense with which the prisoner is charged is alleged to have been committed.

I do not find that this practice has been adopted in like cases in any other court of the United States. In all the cases which I have examined, the court has proceeded to a final hearing and decision on the return of the writ, without notice to any State officer other than the person to whom the writ was directed. I cannot but think, however, that the practice which this court has here adopted is better adapted to guard against abuse of the Federal process, and to secure that full and impartial hearing which is essential to the due administration of justice. It is certainly a delicate matter for this court, although acting within the undoubted scope of its jurisdiction, to take from a State officer a person committed to him by a State court, charged with an offense against State laws. The great respect I have for State authority, the appreciation I have of the importance of a faithful enforcement of the criminal laws of the State, and the reluctance I feel to exercise any

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authority which may interfere with the regular administration of justice by the courts of the State, have induced me to adopt a practice, which, whilst it substantially protects the liberty of the citizen, in case he shows himself entitled to such protection, at the same time manifests no undue disposition to interfere with State authority, and tends to secure that full hearing which I think should, if possible, always be had when the question to be decided relates to a conflict of jurisdiction between the National and State courts. I have no disposition to shrink from the performance of any duty enjoined on me by the Constitution and laws of the United States ; but I will not and cannot interfere with the administration of the State laws, except when my duty is plain and my path clear.

On the day designated in the order, the learned attorney for the commonwealth in the fifth circuit, which includes the county of Mercer, appeared, and both he and the prisoner produced evidence.

By the attorney for the commonwealth it was shown, that on November 6, 1867, a warrant, purporting to be founded on the oath of N. C. Cull, was issued by the presiding judge of Mercer county, for the arrest of the relator, charging him with the crime of murder ; that on November 7, the same judge committed the relator to the jail of Mercer county, there to be safely kept until the 9th, when he was to be delivered to the sheriff, to be brought before him for examination ; that on November 8, the relator was, by order of the circuit court for Mercer, transferred to the jail of Fayette county, the jail of Mercer county being ascertained to be insecure ; that before this order of transfer was made, the grand jury impaneled in the circuit court for Mercer county had investigated the charge against the prisoner, and had agreed to return an indictment ; and that they did, on November 14, return into court an indict-

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ment charging him with the crime of murdering one J. J. Cull.

On behalf of the prisoner, it was shown, that on October 18, 1867, a process, purporting to be founded on information given under oath, was issued by a commissioner of the United States, commanding the arrest of Joshua J. Cull, charging him with certain crimes under the internal revenue laws ; that the process was immediately placed in the hands of a deputy marshal, who failed to execute it because he could not find the accused, though he visited his residence and made diligent search for him ; that the process was then placed in the hands of another deputy, who likewise failed to execute it, though he also made diligent effort ; that this deputy reported to the marshal that, in his opinion, the process could not be executed without the observance of unusual effort and secrecy, and that he had been credibly informed by the wife of the accused, and perhaps others, that the accused would forcibly resist its execution ; that the marshal, on October 30, by writing on the back of the warrant, appointed A. W. Fogle special bailiff, and placed said warrant in his hands for execution, informing him at the same time of the necessity of observing proper secrecy, as the accused was endeavoring to evade arrest, and enjoined him to take with him assistance, as the accused would, if found, probably resist arrest.

It was also shown, that Cull knew the marshal of the United States had a process for his arrest ; that on November 4, the deputy required the relator to assist him in the execution of said process ; that in the evening of the same day the two proceeded to the residence of Cull, arriving there about eleven o'clock at night ; that the deputy, Fogle, sent the relator to the back door of the house and went himself to the front door ; that this precaution was adopted to prevent the escape of the accused ; that the deputy knocked loudly at the front

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door several times before he received any response; that in reply to his inquiries from within, "Who in the hell's there?"—"What in the hell do you want?" he said, "Mr. Cull, I want to see you; I have business with you;" that in reply to the further inquiry, "Who are you?" he said he was an officer, and must and would see him; that after a few moments of silence, which the deputy understood Cull was employing in the preparation to open the door, he heard a noise at the back door, and his assistant, the relator, crying loudly, "Don't shoot! don't shoot!" that he immediately ran to the corner of the house, and saw Roberts coming toward him, still crying "Don't shoot! don't shoot!" that Cull was advancing on Roberts, and fired twice in close succession at him near the back door; that Roberts continued to retire and Cull to advance; and that Cull, after having advanced fifteen or twenty steps from the back door, and after Roberts had retreated so as to be near the bailiff, again fired twice, but whether at Roberts or the deputy does not appear; that Roberts fired instantly at Cull once, and he and the deputy then retired and returned to Harrodsburg, a distance of ten miles, by separate roads, and that the deputy did not know till next morning that Cull was killed, or that Roberts was not killed. It appears from other evidence that this shot by Roberts proved fatal; that Cull was killed, and that when his body was found he held in his right hand, clenched tightly, a pistol, commonly known as a "revolver," of which four barrels were empty, and two loaded.

I attach no importance to the testimony of Mrs. Cull, who says she did not hear the person who knocked at the front door say he was an officer; nor to the testimony of Mrs. Funk, who says she was standing in her front door, about seventy-five yards from Cull's, and that she did not hear the remark; because the former was too much frightened at the time, and

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immediately afterwards, to remember what occurred, and the latter was too far off to hear what was said. This lady, however, did hear a voice which was not familiar to her, crying "Don't shoot! don't shoot!" She also heard what she took to be one shot near Cull's back door, and she saw two shots fired as the parties approached the front of the house, which she thought proceeded from the parties nearest the front.

I have stated thus minutely all the material facts proven, in order that the basis of my opinion and decision may fully appear.

It is hardly necessary to say, that the writ issued in this case was not issued under section 14 of the judiciary act of 1789, 1 *Stat. at L.* 81. This statute authorizes the judges of the United States to issue writs of *habeas corpus* only in behalf of persons who "are in custody under or by color of authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." To a writ issued under this statute, unless it issue simply to bring the party into court to testify, a return, showing that he is held under State authority to answer to an offense against State laws, would be conclusive, and would oust this court of all authority to proceed further. The writ was here issued under and by virtue of the authority conferred by section 7 of the act of March 2, 1833, 4 *Stat. at L.* 634.

This section provides "That either of the justices of the supreme court, or a judge of any district court of the United States, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined, on or by any authority or law, for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof, anything in any act

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of Congress to the contrary notwithstanding." It matters not that the person is in confinement under the authority of a State, or of a law of the State. If he is confined "for an act done in pursuance of a law of the United States, or of a process of any judge or court thereof," he is entitled, under this statute, to his writ of *habeas corpus*, and to his discharge.

But the learned attorney for the commonwealth, frankly admitting that he is surprised at the extent to which he finds, on examination, the courts of the United States have exercised their authority under this act, still insists that the relator, in this instance, should not be discharged, because:—

First. He questions whether there was any authority in the marshal of the United States to appoint a bailiff; and he maintains that, if there was not such authority, there would be no pretense for the assertion that the relator was imprisoned for an act done in pursuance of a law of the United States, or of a process of a judge or court of the same.

I say the learned attorney only questioned the authority of the marshal to appoint a bailiff. He did not seem to have much confidence in the force of the objection, nor did he very earnestly insist upon it. In my opinion, there is not the slightest ground to doubt that the marshal does possess this authority.

The authority to appoint a special bailiff to execute a particular process, is recognized by all the authorities as appertaining to the sheriff. *Watson Sheriffs*, 35; *Tomlin Law Dict.* title Bailiff; *Hunt v. Burrell*, 5 *Johns.* 137; *Sergeant of Court of Appeals v. George*, 5 *Litt.* 199.

There are several acts of Congress which expressly recognize this authority as belonging to the marshal.

It has been exercised by the marshal of this district without question, as far as I know, since the establishment of the court; and such, I understand, is the com-

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mon practice throughout the United States. *Conk. Treat.* 338. But what is entirely conclusive of the question, section 7 of the act of Congress approved July 29, 1861, 12 *Stat. at L.* 282, provides, "That the marshals of the several districts of the United States . . . shall have the same powers, in executing the laws of the United States, as sheriffs . . . in the several States have by law in executing the laws of the respective States;" and the laws of this State expressly provide, that "a sheriff may, by writing, empower any person to execute an original or mesne process." 2 *Rev. Stat.* 340.

The learned attorney insists, secondly—that the bailiff did not, in this case, proceed properly; that he ought to have informed Cull that he had a warrant for his arrest; and that, as Cull was not so informed, he had the right to attack and drive off the bailiff and his assistant, and they are not justified for resisting him.

I have already said, that Cull knew there was a process in the hands of the marshal for his arrest; and I think he had reasonable ground to believe, and did believe, when the person that knocked at the front door announced that he was an officer, and wanted to see him on business, that this person had process for his arrest. The witness, Mrs. Funk, says, that when the buggy, with two gentlemen in it, passed her door, she immediately suspected, from the unusual hour of the night, that they were officers, who had come to arrest Mr. Cull; that she therefore remained at her door watching the buggy till it stopped near Cull's house; and then, her suspicions being confirmed, she remained at the door until after the shooting, as hereinbefore detailed.

Ordinarily, "it is the duty of one seeking to arrest another, to make his purpose known, unless, what will probably answer instead of any express announcement, the circumstances are such as to render the purpose

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obvious." 1 *Bish. Crim. Pro.* § 615; *Rex v. Davis*, 7 *Carr. & P.* 785.

Indeed, it has been expressly laid down, even in respect to an arrest by a private person without warrant, that where the circumstances are such as to make the intention to apprehend plain to the mind of him who is to be apprehended, he need not be told this, and the arrest will be legal, and the resistance of the arrested person illegal, the same as if the purpose had been in words announced. 1 *Bish. Crim. Pro.* § 615; citing *Rex v. Howarth*, 1 *Moody*, 207; *Rex v. Payne*, *Id.* 37; *Pew's Case*, *Cro. Car.* 183, 537, 538; 9 *Co.* 65 b. The foregoing relates particularly to the duty of a person about to make an arrest when in the actual, visible presence of the party to be apprehended; but when not in this position, the authorities state, "it is his duty to proceed with *secrecy* to find him out, and actually *arrest* the party, not only in order to secure him, but also to subject him and all other persons to the consequences of escape or rescue. *Chitty Crim. Law*, 47, 48; 1 *Bish. Crim. Pro.* § 663. The bailiff, then, according to these authorities, proceeded with entire regularity. It was the duty of Cull to respond to the knock at the door by opening it, especially when informed that the person knocking was an officer. If he then did not recognize the person as an officer, he had a right, if the person either arrested or announced that he would arrest him, to demand his warrant.

I suppose, that in all cases where an arrest is made by virtue of a warrant, the warrant being *demanded*, should be produced, but it is to be considered that the arrest, the explanations, and the reading of the warrant, when demanded, "are obviously successive steps. They cannot all occur at the same instant of time." In the case of a known officer the explanation must follow the arrest, and the exhibition and perusal of the warrant must come after the authority of the officer has been

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acknowledged and his power over his prisoner acquiesced in. Commonwealth *v.* Cooley, 6 *Gray*, 350, 356, 357 ; State *v.* Townsend, 5 *Harr.* 487, 488 ; Arnold *v.* Stephens, 10 *Wend.* 514.

If the officer is not known as such, he should show his authority or warrant before making the arrest. Here it is probable that Cull knew, or had good reason to believe, the person knocking at his door was an officer having a warrant for his arrest ; but whether he did or not, that person really had such warrant, and Cull, so far from demanding it, gave him no opportunity to show or read it, but endeavored to escape by his back door, and there making, immediately, without asking any explanation, a violent, and what was intended to be a deadly assault on the assistant of the bailiff stationed there. If Cull had accomplished his purpose, if he had killed Roberts, there is no doubt he would have been guilty of murder, for, though he, perhaps, did not know Roberts, or that he was an officer, he was in fact one, or in the attitude of one, and the law furnished Cull not the slightest excuse for deliberately arming himself and commencing a deadly assault without demanding any explanation.

The learned attorney for the commonwealth suggests, that, in the present disordered condition of things in that portion of this State in which Cull resided, Cull had a right to suppose that Fogle and his assistant were robbers, "regulators," or "jayhawkers," and not officers ; and therefore he might be excused for firing upon them without demanding any explanation. But, wretched as I have reason to believe is the state of society in certain portions of this State, insecure as I know both life and property are, I am not willing to admit that our condition is so bad, or that we have so far degenerated into a state of barbarism, that any court or jury will hold that one may lawfully kill another person, who simply knocks at his door in the night

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and announces that he is an officer and wishes to see him, and that too, without asking any explanation. I say I cannot admit this, but whatever juries might do in the case supposed, under their unlimited power to acquit, sitting here as a judge, sworn to expound the law as I find it in the authorities, I confess myself astonished to hear it gravely contended, that a homicide, committed under the circumstances supposed, so far from shocking all mankind and meeting with speedy punishment, should be palliated and even excused.

Upon the whole, my conclusion is that the bailiff and his assistant, up to the time of the attack of Cull on them, proceeded with entire regularity, and that there is nothing in the case furnishing the least excuse or palliation for the conduct of Cull.

Thirdly, and lastly. It is insisted that under the true construction of the act of March 2, 1833, the Federal court can, under a writ of *habeas corpus*, relieve a party only when it appears that he is in custody under a State law which expressly seeks to punish him for doing what a law or process of the United States requires him to do. That, here, the State law does not make it criminal to execute the process of the United States or to enforce their revenue laws, but simply seeks to punish murder, no matter by whom committed ; that the killing was done in this State ; that the offense can be inquired of only in the State tribunals ; that this court has no jurisdiction to try the accused ; that under the construction of the facts most favorable to the relator he acted in self-defense, but that this is a matter which this court cannot pass upon, and which cannot be lawfully passed upon except by a jury of the vicinage.

I think there is great plausibility and even force in every branch of this proposition. True, much of its force is due to the ingenious form of its statement ; but stripping it of this, and getting at the matter really con-

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tained in it, I think it still presents questions which I should find difficulty in answering if I had no aid from judicial decisions. I am, therefore, grateful that neither the questions of the construction of the act of 1833, nor its application to cases similar to the present one, is now, for the first time, raised in a court of the United States.

By a long course of judicial decisions it may now be considered as settled, that this act gives relief to one in State custody, not only when he is held under a law of the State which seeks expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the State which applies to all persons equally, where it appears he is *justified* for the act done, because it was "done in pursuance of a law of the United States, or of a process of a court or judge of the same." *Exp. Jenkins*, before Mr. Justice GRIER, 2 *Wall. Jr. C. Ct.* 521; *Exp. Jenkins*, before Judge KANE, *Id.* 539; *United States ex rel. Garland v. Morris*, 2 *Am. Law Reg.* 348; *Exp. Robinson*, before Mr. Justice McLEAN, 6 *McLean*, 306; *Exp. Marshal*, 5 *Id.* 659; *Exp. Trotter*, decided by this court in 1862. The decisions in the courts of the United States are absolutely uniform on this subject, and I find no opposing opinion of any court except a single one rendered by the supreme court of Pennsylvania—*Thomas v. Crossin*, 3 *Am. Law Reg.* 207. But, surely, it cannot be expected that I should attach much importance to, much less follow, a single decision of a State court, opposed, as it is, to numerous decisions in the courts of the United States, some of them rendered by justices of the supreme court.

In the first case of *Jenkins* and others, it appears, that *Jenkins* had in his hands a warrant for the arrest of a "fugitive from labor" named *Thomas*, issued under the act of 1850, and that when he and his assistant

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endeavored to arrest the fugitive they were resisted and had a violent and bloody encounter. A warrant was regularly issued by a justice of the peace of the State of Pennsylvania for their arrest, on the charge of "an assault and battery with intent to kill." Under this State process they were arrested and put in jail. But they were discharged by Mr. Justice GRIER, by virtue of a writ of *habeas corpus*, issued under the act of 1833, the judge holding that the deputy Jenkins and his assistant having done no more than they were justified in doing by the warrant, they were imprisoned for an act done in pursuance of a law of the United States within the meaning of the act of 1833, and entitled to their discharge, though they were in State custody for an alleged offense against the general laws of the State, passed to punish assaults generally, and not at all to restrict or oppose the enforcement of the laws of the United States.

In the second case it appears they were imprisoned by virtue of a *capias* sued out in a civil action, brought in the supreme court of Pennsylvania, by Thomas, complaining of the said assault. From this imprisonment they were discharged by Judge KANE, upon the same ground taken in the first case by Judge GRIER.

After this, they were indicted in Luzerne county, Pennsylvania, "for riot, assault and battery, and assault with intent to kill," and were arrested and imprisoned under a bench warrant, founded on the indictment; but they were discharged under a writ of *habeas corpus*, issued upon the order of Judge KANE, and heard before him.

I think it is impossible to distinguish in principle these cases from the one now before me. If Mr. Justice GRIER and Judge KANE had jurisdiction of the cases severally before them, surely I have jurisdiction in the present case. If Roberts was not in terms directed by the process under which he acted to kill Cull,

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neither was Jenkins directed by his warrant to beat or wound Thomas. If Roberts was in State custody under a warrant issued by a State judge, for an alleged offense against the State laws, so was Jenkins when he was discharged by Judge GRIER. Nay, more, when the second and third discharges of Jenkins took place, he was in custody under process issued out of a State court, the one founded on a civil complaint, and the other on an indictment for crime ; but when the writ was issued in this case, Roberts had not been indicted, he had only been committed by a county judge to await an examination. True, the warrant under which Jenkins acted was issued for an alleged "fugitive from labor," under the fugitive slave act of 1850, and the warrant under which Roberts acted was for an alleged criminal offense, under the revenue laws of 1866 and 1867. But I suppose no one will assert that the rights of masters to their slaves are higher than the rights of the government to its revenue ; or that the person of an officer when seeking to arrest a fugitive slave is more sacred than when endeavoring to arrest a criminal.

I disclaim all right and power to discharge the relator on any such ground as that the proof shows he acted in *self-defense*.

A jury would probably acquit him on such ground, independent of the process under which he acted ; but I have nothing to do with such an inquiry. It belongs only to the State court. I have only to inquire whether what he did was done in pursuance of a law and process of the United States, and so *justified*, *not excused*, by that law and process. If the relator is to be discharged by me, it is not because he is excusable, upon general principles of law, for taking the life of his assailant when it was necessary to save his own, but because he was *authorized*, and is *justified* by the law and process under which he acted, to do all that he did. If he was not authorized, and is not justified by that

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law and process in all that he did, he is not imprisoned "for an act done in pursuance of a law of the United States, or of the process of a court or judge of the same;" and I cannot discharge him, but must remand him. I can discharge only the officer who relies on the law and process of the United States as his sole authority and complete justification.

The question then arises, was the prisoner justified in killing Cull, by the law and process under which he acted? He was certainly acting under a lawful process, which (though it did not expressly command the killing of the deceased), did command his arrest; and the authorities are uniform to the effect that if one, in executing such a process, is resisted, and is obliged to take life, as in self-defense, he will be justified.

BISHOP says: "In misdemeanors and breaches of the peace, as well as in cases of felony, if the officer meet with resistance, and the offender is killed in the struggle, the killing will be *justified*." 2 *Bish. Crim. Law*, 3 ed. § 633.

Even in civil cases, "If resistance be made, the person having authority to arrest or retake may repel force with force, and need not give back; and if death unavoidably ensue in the struggle, he will be *justified*." *Id.* § 664.

Mr. EAST says: "It may be premised, generally, that when persons having authority to arrest, . . . . and using the proper means for that purpose, are resisted in so doing, and the party resisted killed in the struggle, such homicide is *justifiable*." 1 *East P. C.* 295.

WHARTON says: "Homicide in self-defense, or *se defendo*, . . is . . excusable rather than *justifiable*." 1 *Whart. Crim. Law*, § 135. "It is justifiable, not only when the proper officer executes a criminal in strict conformity with his sentence, but also when the officer, in the legal exercise of a particular duty, kills a person

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who resists, or prevents him from executing it." *Id.* §§ 936, 937. "Officers of the law, when engaged in the performance of their duties, are invested with a peculiar prerogative. If resisted when so employed, and the party resisting be killed in the struggle, such homicide is *justifiable*. And on the other hand, if the party having such authority, and exercising it properly, happen to be killed, it will be murder, in all who take part in such resistance, though there be no malice. *Id.* § 1030. See, also, *Bish. Crim. Pro.* § 615; *Fost.* 273-308; *Hale P. C.* 457. Other authorities might also be cited, but it is not necessary, since, as I have already stated, they are absolutely uniform.

Now, the facts proven do incontestably show, that the relator was lawfully endeavoring to arrest Cull (for it is hardly necessary to say that he stands in the same attitude with the bailiff himself); that he was proceeding properly; that Cull not only suddenly set upon and violently resisted him, but actually endeavored to kill him; that he forbore to exercise his full, lawful right of immediately pressing forward and killing his assailant, if necessary, but retreated, imploring the assailant not to shoot; that the assailant continued to press forward, and he to retreat; and that not until he had been fired at four times, and his life was in instant peril, did he fire and kill his assailant. No one will be so hardy as to deny, in the light of the authorities cited, that the facts furnished a full justification for the homicide. The justification rests not on the mere fact that the relator's life was in peril, but on the law and process under which he was acting, and on which he is obliged to rely to make out his justification. But if the process *justified*, that is, *authorized* the homicide, then it is clear the relator is imprisoned for an act done in pursuance of a law of the United States, or of a process of a court or judge of the same, and must be discharged.

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It is accordingly ordered, that the prisoner be discharged. I have not been induced to arrive at this conclusion by any apprehension that the relator would not, if remanded, have a fair trial for his alleged offense, in the county of Mercer. I have profound respect for the learning and integrity of the judge who presides in that circuit, and the argument and bearing of the able attorney for the commonwealth, before me, are sufficient assurance of his fairness and honor. If I myself were to be arraigned for any alleged offense, I know of no tribunal before which I could be tried with fuller assurance that enlightened and exact justice would be done me than in that in which these gentlemen are the chief officials. I discharge the relator from no apprehension that injustice would be done him by a trial in the State court, but because he has a right to demand his discharge at my hands under the laws of the United States, which I am bound to administer.

To avoid misapprehension, I desire to say that this court claims no general supervisory jurisdiction over State courts, nor any general power to interfere with persons or property in their custody, except in a few cases, where the Constitution and acts of Congress have given such jurisdiction and power to the courts of the Union. Ordinarily, the Federal courts have no more authority to interfere with persons or property in custody under a process from a State court, than the State courts have to interfere with persons or property in custody under a process from a Federal court. The Federal and State courts have, in many cases, a concurrent jurisdiction over the same persons and things, and the rule is almost universal, that the officer who first gets possession under process from his court, has the preference. Therefore, the general rule is, that if a person be imprisoned under a criminal or civil process of one, the other cannot take him from such custody for any purpose whatever. It is only in virtue of

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the act of March 2, 1833, *supra*, that I have the right to interfere in this case. This act expressly empowers Federal courts and judges "to grant writs of *habeas corpus* in *all* cases of a prisoner . . . in confinement where he . . . shall be confined on or by *any* authority or law for any act done . . . in pursuance of a law of the United States, or any . . . process of any judge or court of the same." And this act, by the express provision of the Constitution of the United States, is the "supreme law of the land . . . anything in the Constitution or laws of any State to the contrary notwithstanding."

Petitioner discharged.

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MATHEWS v. SPRINGER.

*Circuit Court, Fifth Circuit ; Southern District of Mississippi, Special January T., 1871.*

EMANCIPATION.—DEVISE TO FREED SLAVES.

By the laws of Mississippi and Ohio, as they existed in 1858-'59, where an owner of slaves, residing in Mississippi, voluntarily carried them to Ohio with the intent that they should thereby become free, such slaves became free. And they could not lose that *status* by returning, with their former master, to Mississippi for temporary purposes. A devise of proceeds of real property, in favor of negroes formerly held as slaves, but who have been emancipated, is valid. *So held*, under the law of Mississippi, in reference to a case where the emancipation was by the act of the owner.

One who is entitled, by the terms of a will, to a share of the proceeds

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of land sold, as legatee, cannot be barred of his rights in respect thereto, by an adjudication made in proceedings to which he is not a party.

Hearing upon pleadings and proofs, in equity.

The suit was brought by Isaiah J. Mathews and Caroline J. Mathews against Benjamin Springer, executor of the will of Robert L. Mathews, and others.

*W. P. Harris* and *Upton Young*, for the complainants.

*T. A. Marshall* and *J. B. Chrisman*, for the defendants.

HILL, J.—This cause is now submitted upon bill, answer, exhibits, and proof, from which the following facts appear, and upon which the questions to be determined arise :

Robert L. Mathews, a resident of Warren county, in this State, a man possessed of a considerable estate within this State, both personal and real, was in the year 1858, the owner of a slave named Harriet, the mother of complainants, who were then his slaves, and whom he also claimed as his natural children, and whom he was anxious to emancipate and set free, Isaiah being then about seven, and Caroline about five years of age.

Not being permitted by the laws of this State to emancipate them here, and have them continue their residence here, he took them with him to the State of Ohio ; and in the court of common pleas at the May term, 1858, of Hamilton county, in said State, executed a writing by which he declared them *free* and no longer slaves, and procured a decree of said court declaring them free persons of color, and remained with them in Ohio for some weeks, when he returned with them to

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Carroll county, in this State, where they remained until shortly after the death of said Mathews, which took place early in 1859 ; when, by the directions of Springer, one of the executors named in the will of said Mathews, they returned to the State of Ohio, where they have since remained. Said Mathews on February 20, 1859, made and published his last will and testament, and on March 26, 1859, died in said county of Carroll, in this State ; and on April 25, 1859, said last will and testament was duly proved and admitted of record in the probate court of Warren county, the place of residence of said testator at the time of his death.

The testator, leaving no widow or legitimate children as the natural objects of his bounty, after providing in his will for a number of specific legacies to his collateral relatives and friends, directed that his executors should sell and convert the residue of his estate, real and personal, into cash, and deposit the same in the State Bank of Louisana ; that complainants should be maintained and educated out of said funds until they were twenty-one years of age, when the remainder should be divided between them, the said Isaiah Jefferson receiving two-thirds, and Caroline Josephine one-third ; with the further provision that if anything should happen by death or otherwise that his said children should not receive said bequest, that the same should go to said bank for the use of the stockholders.

In June, 1860, the heirs at law and next of kin to said testator filed in the probate court of Warren county their petition against said Springer, who had qualified as such executor, and had proceeded to the execution of the trusts under the will, and also against Downs and Johnson, the other two persons nominated in the will as co-executors with said Springer, and against the said bank, and naming the complainants as defendants thereto, but taking no other steps against them. The petition alleged that complainants were

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slaves, and could not take the bequests provided for them in said will, and that the bequest to the bank was void, because there was no such corporation in existence, and that the pretended devise and bequest to the bank was intended, not for the benefit of the bank, but for the benefit of complainants, and that this provision in the will, as well as the pretended emancipation of complainants, were both attempted frauds on the laws of the State of Mississippi, and against its policy, and void.

To this petition the said Springer and the Louisiana State Bank, which claimed to be the bank intended in the said will, answered the allegations in the same. The court dismissed the petition as to complainants, for the alleged reason that they were slaves, and could not take under the will; and dismissed the same as to said Downs and Johnson, because they had not qualified as executors; and as to said bank, for the reasons charged; and proceeded, according to the prayer of the petition, to declare said bequests to complainants and to the bank void, and ordered distribution of the estate, after the payment of the specific legacies, among the petitioners.

From this decree said Springer and the bank appealed to the high court of errors and appeals of the State, where the decree rendered by the probate court was affirmed; and proceedings were had to distribute the personal estate according to said decree. Subsequently, Springer made a final settlement, so far as he had executed the trusts under the will; and the defendant, Diggins, was appointed administrator *de bonis non*, with said will annexed. No notice of complainants or their interest was taken in the proceedings in said probate court, nor were they in any way brought before it.

Complainants, by their next friend, filed this bill at December term of this court, 1868, for the purpose of

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setting up and enforcing the provisions made for them in said will, notwithstanding the proceedings so had in the said probate court, and so affirmed by the high court of errors and appeals, alleging that their father, the said R. L. Mathews, took them to the State of Ohio with the purpose of emancipating them, and that he did so emancipate them, and with the purpose that they should remain citizens of that State, and receive an education, and the advantages of free persons. That afterwards he returned with them to Mississippi, to remain a short time only ; and in a short time they were to be returned to the State of Ohio as their permanent home. During their stay in Mississippi, after their emancipation, they occupied the position of citizens and residents of Ohio, as far as they were capable of doing so, and were only in Mississippi temporarily. That not having been parties to the proceedings in the probate court and high court of errors and appeals, they were not affected by any of the proceedings therein ; and that they are now entitled to all the provisions in their behalf made in said will, so far as said estate can be collected.

To this bill, said Springer, Diggins, T. A. Marshal, and H. H. Miller, R. S. Buck, Reason Wooley and wife Elizabeth, and Hampton H. Griffith and wife Susan, have filed their answers, admitting the execution of the will, its probate, and the proceedings had under it, as first above stated, but denying that said Robert L. Mathews took complainants to Ohio with the intention of their remaining there ; alleging that his proceedings were intended as a fraud and evasion of the laws of this State ; and that complainants were, at the time of said Mathews' death, his slaves in this State, and a part of his estate, and incapable to take anything under his said will ; that any pretended rights they may claim under said will are concluded against them by said pro-

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ceedings had in the probate court, and affirmed by the high court of errors and appeals of this State.

The questions to be determined by the court are :

1. Did the complainants become free persons of color in the State of Ohio ; and if so, was their condition changed to a state of slavery when they were brought back to the State of Mississippi, and at the death of the testator ?

2. If they were free persons of color at the death of the testator, were they capable of taking under the provisions in their favor in the will ?

3. If free persons of color, and capable of taking under the will, are they now precluded from the provision made in their behalf, by reason of the proceedings and decree of the courts above referred to ?

These questions, if raised in this court before the attempted severance of this and other States from the Union, would have been regarded as of peculiar interest. For many long years a heated sectional controversy had been carried on between the people of the States where African slavery was maintained, and of those where it was forbidden. This controversy existed before the formation of the Federal Union ; and as a compromise, and to avoid more serious results, provision was made in the Constitution for the reclamation of persons held to servitude in one State, who might, without the consent of those entitled to their service, flee to those States where such service was forbidden.

But the result of the late bloody war has been to emancipate all of the race, so long the bone of contention between the slaveholding and the non-slaveholding States ; all are now free, and, under the Constitution and laws, enjoy equal rights as citizens of the United States, and of the several States, as did the white race before this change in the condition of the other race ; so that we approach the consideration of the questions

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presented as we would any other question involving only pecuniary rights and remedies.

The changed condition of the race to which the complainants belong, has nothing to do with the questions to be determined. Their rights, if any they have, are to be determined under the law as it existed at the time of the death of Colonel Mathews, the testator. If they were incapable from their condition on account of race, color, or condition of slavery, then or before that time existing, to take under the provisions made for them in the will, they are now incapable to do so ; so that we must, in considering all the questions presented, place ourselves back at the time of the death of the testator, and the time his estate should have been administered and the trusts in the will executed, had no change taken place.

The first question for determination is, did the complainants become free persons of color in the State of Ohio in consequence of their having been taken there by the testator, who was then their owner, and the proceedings there had by him as stated ?

In the non-slaveholding States I believe it has always been held that when a slave was removed to their territory, or was permitted to go there with the intention upon the part of the owner that he should remain, he at once became free ; and I am not aware of any contrary ruling by the courts of any of the Southern or slaveholding States ; so that if the proof establishes the fact that it was the intention of Colonel Mathews that they should remain there when he took them into that State, they at once, without more, became free, and no change of purpose on his part, or any other act of his could change their condition. In the case of *Rankin v. Lydia*, 11 A. K. Marsh. 813, it is held that no law, at least in that State, could bring into slavery one over whom it has ceased to exist. As stated by the judge who delivered the opinion of the

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court: "It would be a construction without language to be construed, implication without a scrap of law, written or unwritten, statutory, or common, from which the inference could be drawn, to revive the right to a slave when that right had passed over to himself." But we are left in no doubt as to their then condition according to the law of Ohio, as expounded and settled by the supreme court of that State in the case of *Anderson v. Poindexter*, 6 *Ohio*, 622, in which it is held that a slave being permitted by the owner to go into Ohio, no matter for what purpose, thereby became free as soon as he entered that State. This, it is true, is contrary to the holding of the courts of most of the Southern States; with perhaps the single exception of Louisiana, the Southern States claimed and their courts, with the exception mentioned, held that the taking of a slave to a non-slaveholding State, with the intention of only a temporary sojourn or a mere transit through the State, did not communicate freedom to the slave. But conceding that the complainants were taken to Ohio by the testator with the intention that they should be free, there can be no doubt but that they became free, and there is no doubt but such was his intention and purpose. And it may as well be said now as again, that the preponderance of the testimony is that he intended that they should become residents of the State of Ohio, and enjoy all the rights of free persons of color resident within that State, although he would have greatly preferred that during their minority they should have remained with him in Mississippi, if they could have enjoyed the same advantages here. The testimony all goes to show that he was a man of intelligence, and understood the laws of Mississippi upon the subject, and knew that they could not be permitted to remain in Mississippi after the notice given them to depart from the State; he further knew

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that they could not be permitted to enjoy the benefits of an education in this State.

At the time he brought them back to Mississippi, they were too young to be at school ; they were also too young to produce any of the evils which free persons of color residing in the State were supposed to exert as an evil influence on the slave population of the State. I am, therefore, satisfied that the complainants did become and were free persons, from and after they were so taken to the State of Ohio, even upon the view entertained by the people of the slaveholding States, and that expressed by their highest tribunals, and were then entitled to all the rights appertaining to free persons of color in the State of Ohio.

The next branch of the first inquiry is, did complainants lose the rights so conferred upon them, by being brought back to Mississippi ? It is contended by defendants' counsel that they did, and the case of *Hinds v. Brazeale* is referred to as authority to maintain this position. That was a case in which the owner had carried a slave to the State of Ohio and executed a deed of emancipation with an intention of immediately returning with the slave to the State of Mississippi, and had done so to avoid the laws of the State of Mississippi, and to give to the slave so intended to be emancipated, the rights and privileges of a free person of color here, as though the emancipation had taken place here ; it was held to be a fraud upon the laws of this State, and, therefore, void in this State, notwithstanding the act might have been held valid in the State of Ohio ; and that to allow the emancipation of slaves to remain in this State was contrary to the declared policy of the State, as shown by the general course of legislation on the subject. The case reported in 1 *Rand. (Va.)* 15, was referred to in that case, and is relied upon in this. These cases would be applicable in this case were the facts similar, but, as already stated, the weight of the

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evidence is that the testator did not intend to return with them to this State when he took complainants to Ohio. The will itself, made but a short time afterwards, shows that he did not intend them to receive or enjoy the property here, and is a strong circumstance against his intention that they should remain here for any considerable length of time. The estate intended for them was all to be converted into money and deposited in the State Bank of Louisiana, in the city of New Orleans. The complainants were to be supported and educated out of it. These educational opportunities could not be obtained in this State, or in any one of the slave States ; at least they could not be in this State, and could not in any other slave State as they could in Ohio. Taking all the proof together, I am satisfied it was the intention of the testator that complainants should be returned to Ohio to remain, and that they should enjoy his bounty there, or at least not in this State ; and that this case does not fall within the principles of the case of *Hinds v. Brazeale*, and that complainants were not the slaves of the testator at his death, but were free persons of color, temporarily in this State, just as it was contended by the Southern States, that slaves might be taken to a non-slaveholding State, and remain *temporarily* without becoming free.

Upon a careful examination of the provisions of the Code of 1857, then in force, no prohibition of law can be found against their doing so, had they been adults, and much less so when they were infants incapable to violate the law, or suffer its penalties. Article 80, section 12, chapter 33 of the Code, provided that it should not be lawful for any free negro or mulatto to emigrate to, and become a resident of this State, and provided as a penalty that any justice of the peace might give him ten days' notice in writing to leave the State, and if he did not do so, issue a warrant, and cause him to be apprehended ; and authorized the board of police to or-

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der him to be sold by the sheriff to the highest bidder as a slave for life, the proceeds to go into the county treasury ; and further provided, that free negroes and mulattoes then in the State without leave might be dealt with in the same way. It will be observed, that to incur this penalty, the free negro or mulatto must *immigrate to the State*, and must further *become a resident of the State* ; in other words must make it his home. This cannot be said of one who came here to remain temporarily, or for a short time ; such a person cannot be considered a resident. Again, no penalty was incurred until after the ten days' written notice had been given, and a failure to depart on the part of the person so here without authority, and until this was done no law could be held violated. Thus three things were necessary to subject him to this *severe penalty* : First, he must emigrate to the State ; secondly, reside in the State, that is, make it his home ; thirdly, he must refuse or neglect to leave the State after having first been served with a written notice from a justice of the peace to leave the State, being allowed a temporary residence in the State after the notice, all of which pre-supposed that the party was capable of acting, and where action, or non-action, was a crime, the commission of which was visited with the severe penalty of becoming a slave for life. Such a penalty it cannot be supposed the legislature intended to inflict upon an infant incapable of committing any other crime. No provision is made by the Code for a free negro brought into the State in infancy. The statute in force before the adoption of the Code of 1857 did provide, that after they arrived at the age of sixteen years, and upon thirty days' notice to leave the State, and a refusal, they might be sold for one year. Upon a careful examination of the subject, I am satisfied their residence here, under the circumstances, was not a violation of law. And without the same being as a punishment for some crime of which the party was

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convicted, I know of no law by which a person once a slave, but freed therefrom, could be returned to his former condition of slavery ; even his own voluntary agreement could not bind him to servitude for life, much less, if a female, to transmit the condition of slavery to her children. The theory in the case of *Hinds v. Brazeale* is, that the slave mentioned never was free.

Having determined that complainants were, at the time the testator made his will, free persons of color, permanently domiciled in Ohio, and only temporarily here, they were entitled to hold all the rights and provisions made for them by the will, which they could have done had they always resided in Ohio ; and which brings us in the investigation to the next point of inquiry, and that is, what are those rights ?

Defendants' counsel deny that they could then or now acquire anything, and rely upon the cases of *Herin v. Bridault*, 37 *Miss.* 209, and *Mitchell v. Wells*, *Id.* 235, to sustain this position. These two causes were decided by the court at the same time, under the same circumstances, involving the same questions as to principle, and the judges were divided in opinion in the same way, so that the consideration of the one may be considered as the consideration of the other, with this difference in the facts ; that in the former case the free negro had never been a slave in this State—only a resident free negro—and in the latter had been a slave in this State, and was taken by her owner to Ohio, and there emancipated by deed, and only remained there some eighteen months, when she returned to this State, and resided with her former owner as a servant in his family, until September, 1848, about one month after the death of the testator, when she married a free man of color who resided in Jackson, Mississippi, and resided with him here until 1851, when she returned to Ohio. In the former case the beneficiary in the will was a free woman of color, and came with the testator from

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New Orleans to this State, and resided with him as the mistress of his family, and had done so for a number of years before his death.

The principles announced by the judge who delivered the opinion of the court in this case, was, that "Alien free negroes and mulattoes, being without the protection of the Federal Constitution as citizens of the United States, and being of a barbarian race, with whom civilized nations have no commercial, social, or diplomatic intercourse, and hence regarded as *perpetual enemies* (though no war be waged against them), are incapable of taking or holding any species of property in this State; and a devise or legacy to any person of that class was absolutely void; and that all free negroes and mulattoes coming into this State from other States, were to be treated as alien enemies, and to have enforced against them the *strictest* rule of the ancient law applicable to alien enemies, except as to life and limb."

The same judge, in delivering the opinion of the court in *Mitchell v. Wells*, uses this language: "The policy of Mississippi being against emancipation, either here or elsewhere, of slaves once domiciled within her limits, her courts will not give any effect to the emancipation of a Mississippi slave in another State; and a slave so manumitted cannot, therefore, take or hold any property in this State, or maintain any suit in her courts." Although the facts in these cases are dissimilar to those in the case under consideration, it must be admitted, if the principles announced are held to be binding on this court, as is claimed, they would be decisive against the complainants. But upon a careful examination of the statute on wills, and of the authority to bring suits in the courts of the State, no prohibition will be found against such a disposition by a testator of his estate, or of its enforcement in the courts of this State. Therefore, there is no statute to construe

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making any such provision ; and when left to judicial construction *of the policy of the State*, this construction will be found not to be the uniform construction given by the supreme court of this State.

In the early case of *Leach v. Cooly*, 6 *Smedes & M.* 93, it was held, that where a testator, by his will in 1836, directed his slaves to be set free, and sent to Indiana or Liberia, as they might prefer, and directed also a sale of his property, and part of the proceeds to be paid to his slaves thus liberated, the will was held to be valid, and that the executor could proceed with its execution ; and that the bequest to the slaves was not void for want of capacity in the slaves to take. If they did not comply with the terms of the will, it was void ; but if they did, it was valid. In the more recent case of *Leeper v. Hoffman*, 26 *Miss.* 615, it was held, where a conveyance was made to a negro over whom the owner had ceased to exercise acts of ownership, who had not been emancipated according to the laws of the State, but who afterwards removed to the State of Ohio, and by the acquiescence of the owner, and the residence in that State, afterwards became free, that she was entitled to the property conveyed, and to the right to bring and prosecute her suit for its recovery in this State. The learned judge, in delivering his opinion, held, that the principle announced in the case of *Hinds v. Brazeale* did not apply, and that the devise in that case was declared void, for the reason that the attempted manumission was intended to take effect in this State, in fraud of its laws ; and in support of the principles decided in *Leeper v. Hoffman*, referred to the case of *Ross v. Vertner*, 5 *How.* 303, in which it is held, that it was not against the policy of the State of Mississippi for the owner of slaves to send them to Liberia, there to remain free, and that such a trust in his will was a valid trust.

But in the still more recent case of *Shaw v. Brown*,

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35 *Miss.* 246, decided after the passage of the Code of 1857, the court held, that the owner of a slave domiciled in this State might lawfully remove him to another State, where emancipation is allowed, and manumit him in accordance with the laws of that State, and that the power so to do resulted from the absolute dominion of the owner over his property, and was not prohibited by the laws of this State, or against its policy, but was expressly recognized by the act of 1842; and I will here say, that the provision of the Code of 1857, when properly construed, does not conflict with the act of 1842 in this particular. Article 9 of section 3, chapter 33, which was doubtless in the mind of the learned judge who delivered the opinion of the court in the cases of *Mitchell v. Wells* and *Heirn v. Bridault*, does not apply to the case of an owner of a slave taking him to another State, where emancipation is allowed, and emancipating him, but refers to a case where provision is made for the emancipation of a slave after the death of the owner, the reason for which doubtless was to prevent slaves from importuning their owners, when old, or infirm in body and mind, to make such provisions for them; and the still stronger reason, that when such provision was made, the slaves so provided for might, in their eagerness to obtain the boon of freedom, take means to hasten it by procuring the death of their owner and benefactor. Article 97, section 14, chapter 33, provides, that if any person shall take any slave from this State for the purpose of emancipating such slave, or if, having been emancipated elsewhere, such emancipated negro shall return to this State, or be brought back by the former owner, such former owner shall in no case be allowed to protect such emancipated negro, or to claim any right or authority over him; but such negro shall be dealt with as a free negro being in the State without authority. This provision shows clearly that the legislature did not in-

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tend to prohibit persons from taking their slaves out of the State for emancipation, but only intended to prevent their return and residence here, by cutting asunder all the relation between the former owner and the slave after such manumission. If, in the case of *Hinds v. Brazealle*, the provisions of the Code of 1857 had been in force when the slave was taken to Ohio, the court would have held him free upon his return to Mississippi, but without lawful authority to remain. The case of *Shaw v. Brown*, whilst it decides that when the slave is taken by the owner to another State and manumitted, with the intention of an immediate return and residence in this State, it is a fraud against the laws of this State, and void, holds, that such intention must be immediately connected with, and made a part of the transaction of the emancipation; and also, that if the intention to return after manumission be abandoned, such intention, after abandonment, will not impair the rights of such free negro.

It is also held, in the same well-considered case, that it is not true that the States of the Union extend to each other no other rights than those given by the Constitution of the United States; but on the contrary, the principles of private international law and the comity of nations apply with greater force, as between the inhabitants and citizens of the several States, than between foreign nations; and refers to the case of the *Bank of Augusta v. Earle*, 13 *Pet.* 519.

It is further held in that case, that although free persons of African descent were not citizens of the States in which they resided, within the meaning of the Constitution of the United States, yet, though they were an inferior and subordinate class, having no rights except such as those who held the power of government might choose to grant them, they were, nevertheless, subjects and inhabitants of, and derived their rights of person and property from the States of their residence;

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and, by the comity of nations, they were entitled to the enjoyment of their rights in every other State in the Union, unless the exercise thereof was positively prohibited, or incompatible with the laws and policy of the State in which they were claimed ; and further, that free negroes of other States are not regarded as *outlaws, banished people, or alien enemies* in this State, and as such entirely without the protection of our laws ; but such persons, being inhabitants of co-States, are entitled, upon reasons of comity, to enjoy here all the rights secured to them in the place of their domicile which are not positively prohibited by law, or contrary to the public policy. And that the ingress and residence in this State of free negroes from other States was prohibited, but that the reason of that policy was in reference only to their presence and residence here, and in consequence of their improper influence with the slaves in this State, and the force of their example in producing discontent and insubordination in the slaves ; and hence they were only debarred from exercising *here* such rights as required their personal presence. And that a free negro of another State might, therefore, lawfully be a legatee of a pecuniary bequest, which is directed by the will to be raised by the sale of the testator's plantation and slaves, and paid to the legatee out of the State,—just the provision made in the will of Colonel Mathews. Indeed, it is probable that this will was made with a full knowledge of this decision, the decision being made in April, 1858, and the will in the February following. The principles laid down in the case of *Shaw v. Brown*, are not in conflict with any decision made in the State, or with any law of the State, but are sustained both by the decisions in the cases stated, and the statutes, with the exception or the cases of *Heirn v. Ridault*, and *Mitchell v. Wells*, the weight of which as authority, is greatly weakened when it is a matter of public history that they were

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made during a time of great public excitement between the people of the slaveholding and non-slaveholding States ; in none of which was this excitement greater than our own.

Judges, no matter how learned they may be, and honest of purpose, are subject to like influences with other men, and it would be strange if under such excitement and pressure of public opinion, they would not sometimes come to conclusions to which they would not come under other circumstances. But this is not the only reason that goes to weaken the weight of these cases as authority. While, so far as they related to the cases then before the court, they were the judgment of the court, and to be respected as such, yet the conclusions to which the majority of the court came were not those to which all the members of the court arrived. The learned judge who had delivered the opinion of the court in the cases of *Lydia v. Hoffman*, and *Shaw v. Brown*, was so convinced of the incorrectness of many of the opinions expressed that he deemed it his duty to deliver well-considered dissenting opinions in each case, in which the reasons given by him were then and are still to my mind much more convincing and satisfactory. The decisions of the court of the State as to her laws and public policy, to be authority, must have been continuous and uniform. Those that are conflicting, and especially those made under public excitement and pressure of public opinion, have been held by the supreme court of the United States not binding on that court ; nor are they on this. In the case of *Pease v. Peck*, 18 *How.* 595, Mr. Justice GRIER, in delivering the opinion of the court, uses this language : " When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions ; and much more so is that the case when, after a long course of consistent decisions, *some new light suddenly springs up, or an*

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*excited public opinion has elicited new doctrines* subversive of former safe precedent." The same doctrine is held in recent cases in *Wallace*.

I am satisfied, from a careful examination of the facts and the law bearing on this point, that the complainants are entitled to have the trusts in their favor in the will of the testator executed, unless they are barred therefrom by the proceedings had in the probate court of Warren county, affirmed in the high court of errors and appeals. The defendants' counsel insist that they are ; and this is the third question presented. It is insisted that the will directed the entire estate to be converted into money, and that such direction made the bequest personal, and not real estate ; and that such being the case, the executor was the only necessary party before the court ; and that the decree of that court declaring the complainants slaves, and incapable of taking under the will, is conclusive, and bars them from any right under the will ; and numerous authorities are referred to to sustain this position. It is conceded that the general rule is, that real estate directed to be sold and converted into money will be treated as money, and money directed to be vested in the purchase of real estate will be treated as real estate. It is also true that the executor, as against all persons claiming the personal estate other than as legatees or distributees, does represent the personal estate, and none others need be made parties, as the executor represents the legatees or distributees, and also the interest of creditors, if the claimant is other than a creditor ; and the judgment for or against him, in his representative capacity, binds those whom he represents ; but after the debts and all other claims upon the property or fund are satisfied, and nothing remains but to appropriate the residue to the legatees or distributees, the executor ceases to be a representative, and becomes simply a bailee, holding the property or funds for

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those who are of right entitled to it; and the question as to whom it may belong is one in which the claimants are alone interested. It is a rule of law, too well settled in this State to be controverted, that no one can be deprived of his interest by judicial judgment, without being, by himself or a proper representative, made a party to it, with an opportunity to defend his rights. Where there is a right, there must be a remedy. Thus, the statutes of the State provide that, before a guardian's, executor's, or administrator's final accounts shall be confirmed, all the parties in interest must have been first cited to appear, and have an opportunity to show cause to the contrary, if any they have, why the same shall not be done, and for the reason the questions involved are alone between those entitled to the estate and the fiduciary agent in whose hands it has been placed. And when proceedings are to be had for the division or distribution of the estate or fund, all parties in interest must be before the court, because they, and they only, are interested in the decree that the court may pronounce. I am aware of no case in which a decree has been held binding upon one claiming an interest in an estate as legatee or distributee, who had not in some way been made a party to it, and by which decree he was deprived of his interest and right in the thing claimed.

There is no dispute as to the validity of this will, so far as to the forms of the law being complied with, and the testamentary capacity of the testator, or the validity of the other devises and bequests therein. The contest was one in which those claiming to be heirs at law and next of kin of the testator were parties on the one side, and these complainants and the bank on the other. These complainants were in no way made parties to it, and cannot in any way be bound by it. If they could have been bound by it, it would have had the effect of reducing them again to a state of slavery for life, with-

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out giving them a day in court—a proposition that would not, upon calm reflection, even in that day of excitement, have been maintained by any jurist. Indeed, the very Code, the provisions of which have been so earnestly invoked to sustain the defense, makes provision that any one held in slavery who claims to be free, may assert that right in the courts of this State; and makes provision for the protection of the slave against his master during the litigation. The rules of law and reasons against this point of defense are so palpable, reference to authority or further comment is unnecessary; and it must be held that the trusts under this will in favor of the claimants, as far as it can be done, must be enforced and executed. The will was admitted to probate on April 25, 1859, and was and has been notice to all the world of the trusts and provisions therein made: consequently these heirs and next of kin of Colonel Mathews, and those who held under them, must be held chargeable with notice of the rights of claimants under the will. It cannot be held that their assignees are protected by the decree in the probate court, for they must be held to know the whole proceeding, and that it was without notice to complainants, and that they were not bound by it, for the reasons already stated. It is, however, contended by defendants' counsel, that this court can render no decree in this cause in favor of the complainants without having all the heirs at law of Colonel Mathews before it, who would have been entitled to the estate after payment of the debts and other legacies, had he died intestate, and that most of them being non-residents of the State, have not been, and cannot be made parties, and that their interests are so blended that no decree can be rendered against those who are parties that will do justice to them. There is no controversy between the persons provided for in the will. The will being established and the complainants being entitled to the trust in their be-

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half, there are no parties in interest except those who have had the estate in possession. I am aware of no law or rule which requires the heirs at law and next of kin of a testator to be made parties to a proceeding to enforce the trusts created by the will, and for the very plain reason that they have no interest in it. Indeed, Rule L., adopted by the supreme court, expressly provides that they shall not be made parties ; but in a bill to establish the will, and not for the enforcement of the trusts in it, then they may be parties ; and such will be found to be the rule in all equitable proceedings. It is very different from a proceeding against those entitled to the trusts under the will ; as we have seen, beneficiaries under the will are the parties directly interested.

The result is, that as these complainants were in no way before the court when Springer the executor's final account was confirmed, they were not bound by it, and he must account for the estate that went into his hands, and the administrator with the will annexed must account for the estate that went into his hands. The property, real and personal, that remains, must be sold, and the proceeds loaned at interest, or vested in safe securities until, as provided by the will, the complainants shall become twenty-one years of age ; or, if Caroline shall marry, her portion then to be paid to her. There having been a misdescription of the bank intended as the custodian, and, upon the contingency mentioned, the beneficiary under the will, this part of the provision of the will must fail. If, however, any of the specific legacies under the will have not been satisfied, and are chargeable upon the fund to be raised as aforesaid, they must be first paid ; whether such is the case or not, will be a subject of future inquiry.

Decree accordingly.

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United States v. One hundred barrels of Spirits.

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UNITED STATES v. ONE HUNDRED BARRELS  
OF SPIRITS.

*Circuit Court, Eighth Circuit; Eastern District of  
Missouri, October T., 1870.*

## INTERNAL REVENUE.—TAX ON DISTILLERIES.

The courts will not construe a law imposing a forfeiture, as extending to property which, before seizure, has been sold to a person innocent of the offense by which the forfeiture is incurred, and who has purchased in good faith, unless the intention of Congress that the forfeiture should be absolute and instantaneous on the commission of the offense, be manifest and unmistakable.\*

Revenue laws inflicting penalties for their violation, are not to be construed strictly, nor with excess of liberality; but in such a manner, looking at their policy, purpose, spirit, and language, as will best effectuate the legislative intention.

Under the Internal Revenue Act of July 13, 1866, 14 *Stat. at L.* 98, a removal by a distiller, of spirits distilled by him, from the place of distillation to a bonded warehouse, is a legal act; and it cannot be predicated of such a removal, where this is the only overt act charged, that it was done to defraud the United States of the tax thereon, so as to bring the case within those contemplated by section 14 of the act.

Under the Internal Revenue Act of July 13, 1866, as amended March 2, 1867, 14 *Stat. at L.* 488, distilled spirits purchased in good faith by the claimant, while they were in a bonded warehouse of the United States, to whose collector he paid the taxes due thereon, cannot afterwards be seized in his hands and condemned as forfeited by reason of the previous failure of the distiller, in the course of the manufacture thereof, to keep the books and to make the tri-monthly reports required of him by law.

Repeals by implication are not favored, particularly in revenue laws, and will only be held to exist when the repugnance is positive, and then only to the extent of such repugnance.

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\* Compare the case of *United States v. Fifty-six barrels of Whiskey*, 1 *Ante*, 93.

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Section 5 of the act of March 31, 1868, 15 *Stat. at L.* 58, is not a repeal of that part of section 25 of the act of March 2, 1867, 14 *Id.* 488, which denounces penalties against distillers, for failing to make the entries and reports required of them by law.

The legislation of Congress respecting forfeitures against distillers,—reviewed; and the conclusion reached that it shows a uniform policy, from the beginning, not to extend forfeitures to property in the hands of innocent third persons.

Hearing upon a writ of error.

This cause was a proceeding *in rem* commenced in the United States district court for the Eastern district of Missouri, against one hundred barrels of distilled spirits, to enforce a forfeiture for violations of internal revenue laws.

It was alleged in the information, and admitted by the claimant in his answer, that seizure was made on land, in St. Louis, by the collector, September 1, 1868.

The fourth count of the information was in these words :

“*Fourth.* That the said one hundred barrels of spirits were manufactured at some place within the United States to the said district-attorney unknown, and between the first day of September, A. D. 1866, and the date of said seizure, by some person or persons to the said attorney unknown, and were there and then goods and commodities on which tax was there and then imposed by provisions of law, and the same were removed from the place where distilled, with intent to defraud the United States of such tax, the same being then and there unpaid, contrary to the form of the statutes in such case made and provided.”

The fifth count in the information was as follows :

“*Fifth.* That said spirits were manufactured at some place within the United States to said attorney unknown, between September 1, 1866, and the date of

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the seizure, September 1, 1868, by the use of certain boilers, stills, and other vessels, of which said unknown person or persons there and then had the superintendence, and that during the time said unknown person or persons carried on the business aforesaid, and both before said spirits were distilled, and while they were in his or their possession, said unknown person or persons neglected and refused from day to day to make or cause to be made a true and exact entry in a book kept in such form as the commissioner of internal revenue has prescribed, of the number of pounds and gallons of materials used for the purpose of producing spirits distilled, the number of gallons of spirits placed in warehouse, and the proof thereof, the number of gallons sold, with the proof thereof, and the name, &c., of the person to whom sold, contrary," &c.

The sixth count was the same as the fifth, just quoted, as to the manufacture of the spirits, and charged that the person having superintendence of the distillery :

... "Both before said spirits were distilled and afterward, and while the same were in his possession, did neglect and refuse on the 1st, 11th, and 21st days of each and every month, or within five days thereafter, to render the assessor, or assistant assessor, an account in duplicate. taken from his books in the particulars hereinbefore (in the fifth count of the information) mentioned of all the facts occurring after the last day of account preceding, contrary, &c., whereby and by force of said statutes the said property became and is forfeited to the uses in said statutes specified."

One Henderson. of New Orleans, appeared as claimant, and filed an answer denying the material averments of the information as to grounds of forfeiture, and alleging "that said one hundred barrels of spirits were purchased by him while the same were in a bonded warehouse, and that he, the claimant, paid the

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tax imposed thereon by law before he moved the same from said bonded warehouse," &c.

The parties waived a jury, and submitted the cause to the court upon the following agreed statement of facts :

"It is stipulated and agreed as follows :

"*First.* That John Henderson, claimant, purchased said spirits while in a bonded warehouse in New Orleans, after the same had been placed therein by the owner of the distillery at which they were made ; that the claimant paid to the United States collector the taxes due on the said spirits, and moved the same from the said warehouse according to law, without knowledge on the part of Henderson, at any time before seizure, of any fraud on the part of the distiller, either actual or alleged ; that he was an innocent and *bona fide* purchaser, and himself paid the tax on the spirits.

"*Second.* That Henderson shipped them to St. Louis, and had constructive possession thereof when they were seized.

"*Third.* That said spirits were manufactured and distilled in Louisiana in May and June, 1868, in a distillery run in the name of N. Johnson, by the use of boilers, stills, &c., of which Johnson was superintendent and owner ; and that each and all the facts averred in the fifth and sixth counts of the information (above copied), averred as to a certain unknown person, are true as to said Johnson and the said spirits.

"*Fourth.* That the fourth count in the information (above copied) is true ; but that the said Henderson, claimant, subsequently to the removal from the distillery, and before the removal from the bonded warehouse, and before the seizure, paid the tax on said spirits, and was a *bona fide* and innocent purchaser thereof.

"*Fifth.* That said Henderson was not a purchaser

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from the United States, and the United States at no time sold said spirits."

The attorney for the United States founded his claim for a forfeiture upon the facts alleged in the fourth count of the information above copied, under section 14 of the act of July 10, 1866, 14 *Stat. at L.*, 151, which is as follows: "That in case of goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods and commodities *shall be removed*, or shall be deposited or concealed in any place, with the intention to defraud the United States of such tax or any part thereof, *all such goods and commodities*, and all such materials, utensils, and vessels respectively, shall be forfeited," together with casks, vessels, cases, &c., containing such goods; and every person guilty of or concerned in such removal, deposit, or concealment, with intent to defraud the United States of such tax, shall be liable to a fine or penalty not exceeding five hundred dollars.

Section 45 of the same act, 14 *Stat. at L.* 163, relates specifically to the removal of spirits from places where distilled, and is in substance as follows: "That any person who shall remove any distilled spirits from the place where the same are distilled, otherwise than into a bonded warehouse, as provided by law, shall be liable to a fine of double the amount of tax thereon, or to imprisonment for not less than three months. All distilled spirits so removed, and all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited to the United States, or may, immediately upon discovery, be seized, and after the assessment of the tax thereon, may be sold by the collector for the tax and expenses of seizure and sale."

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After providing for mode of procedure and burden of proofs, the section continues thus: "And any person who shall aid or abet in the removal of distilled spirits from any distillery otherwise than to a bonded warehouse as provided by law, or shall aid in the concealment of spirits so removed, shall be liable, on conviction thereof, to a fine of not less than two hundred nor more than one thousand dollars, or to imprisonment for not less than three nor more than twelve months." The only other sentence in the section provides for the punishment of illegal removal of spirits from any bonded warehouse.

The fifth count of the information, above recited, which alleged the failure of the distiller of the *res* to keep the book and make the entries prescribed by the commissioners, and the sixth count, which averred the failure of the distiller to make certain returns, were founded by the district-attorney upon section 31 of the act of July 13, 1866, 14 *Stat. at L.* 157, and section 25 of the act of March 2, 1867, *Id.* 483, which are claimed by the district-attorney to be in substance the same as sections 57 and 68 of the act of June 30, 1864, 13 *Id.* 243, 248. Section 31 in the act of 1866, is of the same general character as section 57 in the act of 1864; section 68 in the act of 1864 was the one which denounced the penalty for the acts or omissions made illegal by section 57, but no section corresponding to section 68 was contained in the act of July 13, 1866. This omission was supplied by the act of March 2, 1867, section 25, which is of the same general character with said section 68 of the act of 1864; but it contains some additions, particularly in relation "to materials fit for use in distillation found on the premises," which are regarded by the claimant as being very material, as showing the intention of Congress not to forfeit spirits unless found upon the premises of the distiller.

To sustain the fifth and sixth counts in the informa-

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tion, the district-attorney relied upon section 31 of the act of July 13, 1866, and section 25 of the act of March 2, 1867. Section 31 requires the distiller to keep a certain book, and to make true and exact entries of certain facts therein, and also to make tri-monthly accounts, taken from the books, &c. It was admitted that the distiller of the liquor seized did not comply with the above-mentioned requirements of the law.

Section 25 of the act of March 2, 1867, before mentioned, was also cited as material in the controversy, and is in these words :

“That the owner, agent, or superintendent of any still, . . . . who shall neglect or refuse to make true and exact entry and report of the same, or do or cause to be done any of the things by law required to be done concerning distilled spirits, shall, in addition to other fines and penalties now by law provided, forfeit, for every such neglect or refusal, all the spirits made by or for him, and all the vessels used in making the same, and the stills, boilers, and other vessels used in distillation, and all materials fit for use in distillation, found on the premises, together with the sum of five hundred dollars for each offense, with costs, and shall be deemed guilty of a misdemeanor, and be subject to imprisonment for a term not exceeding one year,” &c. 14 *Stat. at L.* 483.

It was admitted that the spirits which are now in controversy were manufactured in May and June, 1868, at which time the act of March 31, 1868, 15 *Stat. at L.* 58, had gone into effect, and was in force ; and it was contended by the claimant that section 5 of this act repeals, by implication, the penalties denounced by previous acts, or that, being the later expression of the legislative will, it is the one which fixes the rights of the parties. This section is as follows :

“That every person engaged in carrying on the business of a distiller, who shall defraud or attempt to

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defraud the United States of the tax on spirits distilled by him, or any part thereof, shall forfeit the distillery and distilling apparatus used by him, and all distilled spirits, and all raw materials for the production of distilled spirits, found in the distillery and on the distillery premises, and shall, on conviction, be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years." 15 Stat. at L. 50.

The judge of the district court was of opinion that section 25 of the act of March 2, 1867, taken in connection with the act of 1866, did not work a forfeiture *eo instanti* ; that the language of those sections being *in futuro*, they did not apply to property which, prior to the seizure, had passed into the hands of a *bona fide* purchaser.

The court accordingly gave judgment that the property in question was not forfeited.

To reverse this judgment, the United States sued out the present writ of error.

The cause was heard in error by DILLON, circuit judge, and KREKEL, district judge.

Chester H. Krum, district-attorney, for the United States, plaintiff in error.

Edmund T. Allen, for the defendant in error.

DILLON, J., delivered the opinion of the court.—The property in controversy between the United States and the claimant consists of one hundred barrels of distilled spirits. The seizure was made September 1, 1868, in the city of St. Louis. It is admitted by the written stipulation of the parties, that these spirits were manufactured by one Nimrod Johnson, in the State of Louisiana, in the months of May and June, A. D. 1868 ; and that the claimant, Henderson, pur-

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chased them while they were in a bonded warehouse in New Orleans, after the same had been placed there by the owner of the distillery ; that the claimant paid the United States collector the taxes due thereon, and moved the same from the warehouse according to law, without knowledge on his part, at any time before seizure, of any fraud on the part of the distiller, either actual or alleged. And it is distinctly admitted by the government that the claimant is a *bona fide* purchaser of the property. Judgment of forfeiture is sought, not for any violation of the law by the claimant, but for the violation of it by the distiller without the knowledge of the claimant, and at a period prior to the time when the *res* was placed in the government warehouse, and when the government collector received from the claimant the amount of taxes due on the property.

If the government is right, the claimant loses not only the spirits, but the large amount of taxes which he paid thereon—loses these entirely, or as to one is thrown on an uncertain resort upon his vendor, and as to the other, upon the sense of justice of the government. Where it is claimed that a law works such results, against which it is almost impossible for a purchaser to guard, the *intention* that it should do so ought to be unmistakable.

Before proceeding to examine the several grounds of forfeiture relied on by the United States, it may be advisable to notice two general propositions of law adverted to by counsel, and which bear upon the question to be determined.

The first is, that after the repeated decisions of the supreme court of the United States, it is to be taken as settled doctrine, that when a statute in terms denounces a forfeiture of property as penalty for violation of law, without alternative of value, or other qualifications or provisions, or language showing a different intent, the forfeiture takes place absolutely and instantaneously

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on the commission of the offense ; title vests in the government from that moment, and it is not within the power of the offender or former owner to defeat the forfeiture by a subsequent transfer even to a *bona fide* purchaser. United States v. Nineteen hundred and sixty bags of Coffee, 8 *Cranch*, 398 ; United States v. Grundy, 3 *Id.* 338 ; Wood v. United States, 16 *Pet.* 342 ; Caldwell v. United States, 8 *How.* 366 ; Clifton v. United States, 4 *Id.* 242, 248.

Another undisputed principle of law is, that penalties annexed to violations of general revenue laws do not make such laws penal in the sense which requires them to be construed strictly. Nor, on the other hand, are they to be construed with an excess of liberality. But it is the duty of the court to study the whole statute, its policy, its spirit, its purpose, its language, and, giving to the words used their obvious and natural import, to read the act with these aids in such way as will best effectuate the intention of the legislature. Legislative intention is the guide to true judicial interpretation. Taylor v. United States, 3 *How.* 197, 210 ; Cliquot's Champagne, 3 *Wall.* 114.

The way is now cleared for a consideration of the several grounds of forfeiture insisted upon by the government. We shall notice first that which is set out in the fourth count of the information, the words of which are given above. The substance of this is, that these spirits, being subject to a tax imposed by the internal revenue law, were removed from the place where distilled with intent to defraud the United States of such tax. By whom removed, or to what place removed, is not alleged in the information. But on the agreed statement of facts it is admitted that the spirits were "placed in a bonded warehouse in New Orleans, by the owners of the distillery at which they were made ; that the claimant paid the taxes thereon," &c. It is also admitted "that the fourth

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count in the information is true ; but that Henderson, claimant, subsequently to the removal from the distillery, and before removal from the bonded warehouse, paid the tax on the spirits, and was a *bona fide* purchaser."

Thus, the facts admitted by the parties are, that the spirits were moved by the distiller to and placed by him within the bonded warehouse of the government, and it is charged in the fourth count of the information, that the removal therein alleged was made with intent to defraud the United States of the tax imposed by law upon such spirits. And, as noticed above, the written stipulation admits that the fourth count in the information is true.

The attorney for the United States maintains the sufficiency of this ground of forfeiture under the facts thus alleged and admitted, and relies upon section 14 of the act of July 13, 1866, which, together with the substance of section 45 of the same act, is set out in the statement of the case preceding this opinion. 14 *Stat. at L.* 151.

Section 14 is general and broad enough in its terms to embrace the removal of spirits, on which there is a tax, when this is done with intent to defraud the United States of the tax, but section 45 is the one specifically relating to the removal of spirits from the place where they are distilled. By this section, the removal of "distilled spirits, from the place where the same are distilled, otherwise than into a bonded warehouse, as provided by law," is prohibited, and is made punishable by penalties differing from those provided in section 14. It is, then, not an illegal act to remove spirits from the distillery to the bonded warehouse. It is to secure the government the tax, that they are thus allowed to be removed. How it can reasonably be predicated of a removal of spirits by the distiller into a bonded warehouse of the government, which is under the custody

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of its own officer, that it was done with intent to defraud the United States of the tax thereon, is not readily perceived, and is not explained in the pleadings, in the admission of facts, nor in the argument of counsel.

Without putting a strained or nice construction upon the language of the fourth count, and of the written admission respecting it, it is our opinion that the case, as made, does not fall within those contemplated by the above-mentioned section 14 of the act of July 13, 1866. The removal is the overt, illegal act alleged, and this was rightful; all that is left of the count under consideration is the intent with which the removal was made. We have said above, that it is difficult to see how it could have been made to defraud the United States of the tax; and a mere intent to defraud, formed or existing in the mind of the distiller, which intention has never been executed, or attempted to be, is not made a ground of forfeiture. The only execution, or attempt to execute the unlawful intent alleged, viz: to defraud the United States of the tax on the spirits, is the removal of the spirits by the distiller to the warehouse of the United States, which removal was legal, and not an illegal act.

For these reasons, our opinion is that the spirits in controversy were not forfeited by reason of the facts set forth in the fourth count of the information, and in the written admissions of the parties.

The other grounds of forfeiture relied on by the government are those set forth in the fifth and sixth counts of the information, which allege the failure of the distiller of the spirits in question to make the entries required by law in the book prescribed by the commissioner, and to make tri-monthly reports from the said book. It is admitted that the allegations of the information in this respect are true.

By examining critically the language of the information and of the written stipulation, it will be seen

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to admit of doubt whether the distiller, Johnson, was guilty of the aforementioned neglects at and during the period when the spirits in controversy were distilled, or whether his neglect was before or after the distillation of these spirits; but it is clear that the neglect of the distiller in this respect existed at a time when these spirits were in his possession.

Suppose, as the government contends, that section 25 of the act of March 2, 1867, applies to the case, and that the distiller was not in default as to entries and reports *at the time* the spirits in question were made, but that he made default in these respects while these spirits remained in his possession, are they forfeited by this section, which includes "all spirits made by or for him," or is this language limited to such spirits as are made by or for him while the neglect or refusal to make the required entries or reports continues?

As the counsel for the claimant has not rested his case upon any such ground, we waive its consideration, and proceed to examine the questions made by the respective counsel, so far as it is deemed necessary to do so.

The attorney for the government bases the claim to condemn the property as forfeited, by reason of the facts alleged in the fifth and sixth counts of the information, upon section 31 of the act of July 13, 1866, 14 *Stat. at L.* 157, which imposes upon the distiller the duty of making the entries and tri-monthly report, and upon section 25 of the act of March 2, 1867, *Id.* 483, which denounces the penalty of forfeiture for the neglect or refusal of the distiller to perform this duty. But to what the forfeiture extends, or when it is worked, are disputed questions in the case. The attorney for the claimant contends that the above-mentioned section 25, as to penalties, is repealed or superseded by section 5 of the act of March 31, 1868, 15 *Stat. at L.* 58, which was in force when these spirits were made, and by

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which the forfeiture is limited to spirits found on the premises, or, at most, to those owned by the fraudulent distiller, if found elsewhere.

If the act of March 31, 1868, could be considered as entirely repealing the previous act, the conclusion of the claimant's counsel would be correct, viz : that under the act of 1868, spirits which before seizure had passed through a bonded warehouse, from the hands of the distiller into those of the *bona fide* purchaser, would not be forfeited for the previous frauds or acts of the manufacturer. But the law does not favor repeals by implication, particularly in revenue statutes, the provisions of which, to prevent fraud, are complicated, and enacted frequently at different times to meet special exigencies or defects in previous enactments. To operate a repeal by implication, the repugnance must be clear and positive, so as to leave no doubt as to the intent of Congress. *United States v. Sixty-seven packages of Books*, 17 *How.* 85, 93.

By recurring to section 5 of the act of 1868, it will be seen that it is limited to punishing distillers for defrauding, or attempting to defraud the United States of the tax on spirits distilled by them ; and to convict the distiller, or to condemn property as forfeited under this statute, an intent to defraud must exist in the mind of the distiller, and be established by evidence. Whereas, under the act of 1866, section 31, and of 1867, section 25, an intent to defraud existing in the mind of the distiller is not made essential ; if he neglect to make the entries or report required, the forfeiture in law attaches, although he may be able to show, as matter of fact, that his neglect was innocent of any fraudulent design. The penalties in section 5 of the act of 1868 being different from those in the former act, it is a repeal by implication, so far as it and the provisions of former acts provide for the same offense, but no further. *Norris v. Crocker*, 13 *How.* 439 ; *Sedgw. Const. & Stat.*

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*Law*, 125 ; *Nichols v. Squire, Peck*, 168 ; *State v. Whitworth*, 8 *Port. (Ala.)* 434.

Being of opinion that the act of 1868 is not a repeal of that part of section 25 of the act of 1867, which denounces penalties against distillers for failing to make the entries and reports required of them, it is necessary now to consider another position taken by the claimant's counsel, viz: Admitting that section 25 of the act of 1867 is yet in force, and is the one applicable to this case, still, the spirits in controversy are not, under the agreed facts, forfeited by virtue of its provisions, because they were not found on the premises of the distiller, but in the possession of an innocent purchaser. The argument is, that the words "found on the premises" relate to, and qualify the whole list of forfeited articles, including distilled spirits.

Upon an examination of the language of this section in the light of its legislative history adverted to in the statement of the case, and in the light of other provisions of the statutes relating to forfeitures denounced against distillers, it is our opinion that his position is substantially correct ; in other words, that it was not the intention of Congress to denounce an absolute and instantaneous forfeiture on the commission of the offense, of all spirits, but only those either found on the premises at the time of seizure or information given, or, if found elsewhere, still owned by the party guilty of the wrongful act or omission.

This conclusion, reached, it must be confessed, after some hesitation, and adopted with some lingering distrust of its soundness, rests full more upon the general spirit and purpose of the legislation of Congress respecting the rights of third persons, than upon the particular words of section 25 of the act of 1867, if these stood alone with nothing beyond to aid in their interpretation. This conclusion is fortified by supposing Congress in its legislation to have been regardful of the or-

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dinary sense of justice, and not to have designed to make the innocent suffer for the acts of the guilty, and to visit the laches of officers of the revenue upon those guilty of no wrong and no neglect. And it is still further strengthened if we have regard alone to considerations of mere policy. Revenue is the sole purpose of all the complicated official machinery pertaining to the manufacture of spirits. The duty levied is high, the temptation to fraud correspondingly great. Congress will be presumed to have seen, unless the contrary clearly appears, that revenue would be promoted by making it safe to buy manufactured spirits, and would be injured by legislation of a contrary character, by which a "secret taint of forfeiture is indissolubly attached to the property, so that at any time, and under any circumstances, within the limitations of law, the United States might enforce their rights against innocent purchasers." Per STORY, J., *United States v. Nineteen hundred and sixty bags of Coffee*, 8 *Cranch*, 398, 406.

The policy of Congress to confine the forfeiture to the property of the guilty, at least not to extend it to innocent persons, may be seen by section 130 of the act of 1864, 13 *Stat. at L.* 306, which protects *bona fide* purchasers from forfeitures by frauds. The fraudulent vendor forfeits value, but the article bought *bona fide* and paid for cannot be pursued in the hands of the purchaser. So in the act of July 13, 1866, 14 *Id.* 153, if the distiller fails to pay the tax for carrying on his business (§ 23), or fails to give bond, or gives a false or fraudulent notice (§ 24), he forfeits only such liquors as are owned by him, or found upon the premises; which evidently means owned by him at the time of seizure or date of information given. So in section 5 of the act of March 31, 1868, 15 *Stat. at L.* 58, so often mentioned, it is provided that the distiller who defrauds or attempts to defraud the United States of the

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tax on the spirits distilled by him, shall forfeit, among other things, "all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises."

This section, as above observed, does not repeal all prior laws inflicting penalties and forfeitures upon distillers, but repeals them only so far as they relate to the same offense. But being in *pari materia* with section 25 of the act of March 2, 1867, relied on by the district-attorney, and which governs this case, it may be properly resorted to when endeavoring to discover the meaning of that section. Under the act of 1868, spirits, which had passed into the hands of a *bona fide* purchaser, and not found in the distillery building or premises, would not be liable to be condemned as forfeited. So by the act of July 20, 1868, 15 *Stat. at L.* § 44, passed soon after the spirits in controversy were made and before they were seized, but which saves forfeitures already incurred (*Id.* 166, § 195), all obscurity as to extent of forfeiture is removed, and the forfeiture is in terms limited to "distilled spirits owned by such person (the offending distiller), wherever found, and all distilled spirits and personal property found in the distillery," &c. 15 *Stat. at L.* 142, § 41; and see sections 5, 7, and 19 of same act. This legislation shows quite satisfactorily a uniform policy on the part of Congress from the beginning not to extend the forfeiture to innocent third persons.

In the light of these considerations, and of this legislative policy, we may now recur to section 25 of the act of March 2, 1867, which is the one relied on by the government, and we repeat it as our opinion that, under it, a neglect or refusal by a distiller to make entries and reports as required by law, does not forfeit spirits not "found" on the premises, and not, at the time when "found," the property of the offending distiller. It would, indeed, be strange if such a neglect or refusal,

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which is not necessarily fraudulent in fact, as we have before stated, should have the effect to forfeit spirits in the hands of *bona fide* purchasers, when by other provisions of the statutes, as, for example, that of March 31, 1868, an actual fraud, accompanied with a fraudulent intent, would not have that effect.

The judgment of the court is, that under section 25 of the act of March 2, 1867, a forfeiture *eo instanti* is not worked for omissions of the distiller to make the entries and reports required of him.

This view, if correct, results in affirming the judgment of the district court, and renders it unnecessary to consider the other proposition of the claimant's counsel, which is, that if forfeiture attached to these spirits, *eo instanti* with the commission by Johnson, the distiller, of the offenses charged, the United States *waived* any right of property acquired of such forfeiture, when they accepted from Henderson, the claimant, the amount of the taxes due on these spirits, and surrendered them into his possession, he being innocent of fraud. We content ourselves with remarking, that the proposition, as stated, is of questionable correctness, for *waiver* would imply a power in the revenue officers which they do not possess, and perhaps, also, a knowledge of the forfeiture, which it is not shown they had, when the taxes were received from the claimant and the spirits were surrendered to him. If any proposition could be maintained, it would be the one, that in view of the peculiar provisions of the law for detecting frauds, the ample facilities it supplies its officers, its system of bonded warehouses, the government, by accepting and retaining the taxes paid to it by the claimant is *estopped* to say the property all the time belonged to it by reason of a previous forfeiture of title by the vendor of the claimant. Whether the view is correct, or whether the case could be successfully distinguished from those in which the supreme court has

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held, under the customs revenue acts, that the forfeiture might be enforced against the property in the absence of innocent and subsequent purchasers, we pass without deciding, resting our determination of this case upon the grounds before stated.

The judgment of the district court must be affirmed.

KREKEL, J., concurred.

Judgment affirmed.

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MINOT v. PHILADELPHIA, WILMINGTON, AND  
BALTIMORE RAILROAD COMPANY.

*Circuit Court, Third Circuit ; District of Delaware,*  
1870.

CORPORATIONS.—TAXATION.—CONSTITUTIONAL LAW.

A circuit court has jurisdiction of a suit by a citizen of another State against a corporation created by the State in which the court is held; notwithstanding the corporation also holds charters from other States.

A State, acting through its legislature, may denude itself, by a contract, of power to impose taxes upon a corporation. But such exemption must be conferred expressly, or must appear by clear and necessary implication from the legislative act; it cannot be favored by presumption or intendment.

The payment by a corporation, to the government of the State, of a *bonus* for granting a charter of incorporation, does not protect the grantee of the franchise from all taxation, except such as the State has reserved a right to impose in the charter itself.

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A tax upon the ordinary and lawful means of transportation is really a tax upon the thing carried ; hence, a State law imposing a tax upon locomotives, passenger and freight cars, &c., being not merely a police regulation, but an expedient for raising revenue, involves a tax upon the passengers and freight transported, and is unconstitutional as interfering with commerce between the States.

STRONG, J.—The complainant is a citizen of the State of Massachusetts, and a stockholder of the Philadelphia, Wilmington, and Baltimore Railroad Company, a body corporate of the State of Delaware, under the laws of that State.

The defendants are the said company, and two other citizens of Delaware, one, the treasurer of the State, and the other, collector of State taxes. The facts of the case, out of which title to equitable relief is claimed to arise, are these :

By an act of Assembly of the State of Delaware, passed 1832, and a supplement thereto, a corporation named the Wilmington and Susquehanna Railroad Company was created, with power to build and maintain a railroad from the boundary line of Pennsylvania and Delaware to the city of Wilmington, and thence to the line of the State of Delaware towards the Susquehanna, in the direction of Baltimore. The act provided that the company should pay annually into the treasury of the State a tax of eight per cent. on all dividends which might exceed six per centum on the capital stock actually paid in. This provision was subsequently repealed ; and it was enacted that the company should pay annually into the treasury of the State a tax of one-quarter of one per cent. on the capital stock of four hundred thousand dollars. Under an act of Assembly of the State of Maryland, enacted in 1831, and under its supplements, another railroad company was created, called "The Delaware and Maryland Railroad Company," with power to construct and maintain a railroad from some point on the Delaware

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and Maryland line, to some point on the Susquehanna river : and it was provided in the act, that the shares of the capital stock of the company "should be exempt from the imposition of any tax or burden by the States assenting to said act, except upon that portion of the permanent and fixed works of said company which might be within the State of Maryland." About the same time (namely, in the year 1831), under an enactment of the legislature of Maryland, another company was chartered, called "The Baltimore and Port Deposit Railroad Company," with power to construct and maintain a railroad from Baltimore to Port Deposit, which is on the Susquehanna river. And in the same year (1831), the legislature of Pennsylvania authorized the incorporation of a company called "The Philadelphia and Delaware County Railroad Company," with power to construct a railroad from Philadelphia along or near to the route of the Baltimore post road, to the Delaware State line. The name of this company was subsequently changed to that of "The Philadelphia, Wilmington, and Baltimore Railroad Company." All the companies were organized, and their roads formed a complete line between the cities of Philadelphia and Baltimore, needing only a bridge across the Susquehanna, which was subsequently built by the consolidated company, at a cost of about one million and a half dollars.

It was doubtless the intention of the several legislatures to provide for a continuous line between the two cities. Subsequently, under the authority of legislative acts of the States of Maryland and Delaware, passed in 1835, the Wilmington and Susquehanna Railroad Company and the Delaware and Maryland Railroad Company were consolidated under the corporate name of the former, and became one body politic or corporate, the capital stock of the two companies being united. The act of Assembly of the State of Delaware author-

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izing the consolidation, enacted that the holders of the stock of the united companies should hold, possess, and enjoy, all the property, rights, and privileges, and exercise all the powers granted and vested in the said railroad companies, or either of them, by it or any other law or laws of Delaware or Maryland. A similar act was passed by the legislature of Maryland. Thus the four companies became reduced in number to three. A further consolidation then took place. In the year 1838, the three companies, under legislative provisions of the three States named, were united and merged into each other, thus becoming one body corporate, with a common stock, and having as the corporate name, "The Philadelphia, Wilmington, and Baltimore Railroad Company." The act of the legislature of Delaware, under which this consolidation was effected, declared that "the respective companies shall constitute one company, and be entitled to all the rights, privileges, and immunities which each and all of them possess, have, and enjoy, under and by virtue of their respective charters." The words of the Maryland act were, "that the said body corporate so formed shall be entitled within this State, to all the powers, privileges, and advantages, now belonging to the two first above named corporations;" those whose road lay within Delaware and Maryland.

Such was the origin, and such are the rights of the corporation defendants, so far as they need now be stated. The company have completed, and now maintain a continuous railroad route from Philadelphia to Baltimore, through parts of the three States named. Its capital stock consists of one hundred and eighty-six thousand and eighty-eight shares, fully paid, each of the par value of fifty dollars, although at its formation it had only forty-five thousand shares. Of these less than two thousand were held by citizens or residents of Delaware, on June 30, 1869. The entire length of

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the railroad is ninety-nine and seventy-six-hundredths miles, of which only twenty-three and three-hundredths miles are in the State of Delaware, and the value of the property locally situated in that State, is much less than twenty-three-ninety-ninths of the whole. Much the larger portion of the locomotives, passenger and freight cars, and trucks, belonging to the company, were used during the year 1869 for the purpose of transporting persons and freight in and by a continuous course of transportation, through, from, and into the State of Delaware, and very few were used exclusively within the State.

By an act of Assembly of the State of Delaware, passed April 8, 1869, the legislature imposed upon every railroad and every canal company, incorporated by or under any law of the State, and doing business therein, in addition to other taxes then imposed by law, a tax of one-fourth of one per cent. of the actual cash value of every share of the capital stock of such company, directing the tax to be paid to the State treasurer on the first day of the next following July, and on the first day of July in each and every year thereafter. The president and treasurer of every such company was required to furnish to the State treasurer, every year, a statement of the number of shares of the company, with an appraisement thereof, verified by his oath or affirmation, on the first of each July, and forthwith to pay the amount of the tax. It was provided, however, in the act, that where the line of railroad or canal belonging to any company liable to the tax, lay partly in the State of Delaware and partly in an adjoining State or States, such company should be required to pay the tax on such number of the shares of its capital stock as should be in that proportion to the whole number of shares of such stock, which the length of such railroad or canal within the limits of the State should bear to the entire length of such railroad

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or canal. By section 5 of the act, it was enacted, that if the president or treasurer of any company liable to the tax, should neglect or refuse to furnish the statement above described for a period of ten days after it was required to be furnished, the State treasurer should notify an assessor to assess the tax, and issue a warrant to a collector of State taxes to collect the same.

Section 1 of the same act imposed another tax upon the same class of companies, with similar provisions for its ascertainment and collection. It was a tax of three per centum upon the net earnings or income received by such a railroad or canal company, from all sources during the preceding year, with a proviso like that contained in section 4 already mentioned. This tax was required to be returned and paid on the first day of January in each year, or within thirty days thereafter.

Section 3 of the same act imposed yet another tax, with similar provisions for its return and collection. It enacted that every railroad company incorporated by the State, and doing business therein, should, on the first day of January in each year thereafter, within thirty days from such time, pay to the State treasurer a tax of one hundred dollars, for the use, in the said State of Delaware, of each locomotive belonging in whole or in part to such company, and at any time during the preceding year used by said company within the State of Delaware, and twenty-five dollars for the use in the State of each passenger car, belonging in whole or in part to such company, and at any time during the preceding year used by said company within the State, and ten dollars for the use in the State of each freight car of every description, and each truck belonging to such company, and at any time within the preceding year used by said company within the State. Section 6 of the act enacted that in case of default in paying any of the said taxes, a penalty of ten per cent.

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thereon should be added by the collector, and collected with the tax.

The complainant charges that all the taxes are illegal ; that they are imposed in violation of the rights conferred upon the Philadelphia, Wilmington, and Baltimore Railroad Company by its charter, and that they are forbidden by the Constitution of the United States.

On November 25, 1869, he inquired of the company whether they intended to protect his interests as a stockholder by resisting the collection of the tax ; and stated that, as it was illegal, protection against it should be provided for. In response to his inquiries, the board of directors resolved, that while they protested against the illegality of the tax, they declined to take the responsibility of interfering to prevent its collection, leaving the stockholders at liberty to assert their rights as they might think proper. The complainant then filed this bill, praying that it may be decreed the corporation is not bound to pay the said taxes, or any of them, and that the act of the Delaware legislature, so far as it imposes them, and provides for their assessment and collection, is unconstitutional and void. The bill also prays an injunction upon the company against furnishing the statements required by the act, or paying the taxes, and upon the other defendants against taking steps for their collection.

At the argument it was queried whether the case was within the jurisdiction of the court, and whether, if it was, the case presented was a proper one for equitable cognizance. Upon these points I have no doubt. The complainant is a citizen of Massachusetts, and the corporation defendants are a corporation that owe their life to the State of Delaware, citizens, therefore, of the State, within the meaning of the judiciary act. True, they are also a corporation of Pennsylvania and of Maryland, but they are not the less on that account a corporation of Delaware. They have been sued in the circuit court of the

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United States at least twice before, and the fact that they are a corporation of three States has not been considered an objection to Federal jurisdiction. The other two defendants are citizens of Delaware. And that the court has equitable jurisdiction of such a case as the present is not open to denial. That it has, repeated decisions show, and such has been the determination of the supreme court. *Dodge v. Woolsey*, 18 *How.* 331. It was also submitted at the argument, with some hesitation, that the act of the Delaware legislature, passed April 8, 1869, was not intended to apply to this railroad company. As I have no doubt that it was, I pass this by, and come directly to the great question of the case: Is the act unconstitutional, so far as it imposes the taxes mentioned in it upon the corporation defendants?

The argument on behalf of the complainant is, that in the charter of the company there is an express exemption from liability to the imposition of any such taxes, and that the charter being a contract with the State, the act of Assembly of 1869 is in conflict with the provisions of the Constitution that inhibit the States from passing any law impairing the obligation of contracts. If it be the fact that the charter contains such an exemption, it must be admitted that the consequence mentioned follows, for it is too late to deny that the charter is a contract between the State and the company, and (however well it might be doubted, if it were an open question), it must be conceded that a State, acting through its legislature, may, by contract, in whole or in part, denude itself of power to impose taxes upon a corporation created by it. True, this is a step towards self-destruction, and one would think no State Constitution gives such power to its legislatures. Yet it has more than once been decided; and many contracts made by States with corporations, that their property shall be exempt from taxation, in whole or in

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part, for limited periods or permanently, have been enforced. See cases collected in *Home of the Friendless v. Rouse*, 8 *Wall.* 430.

But I do not think the charter of this company contains any express exemption from liability to such taxation as the State of Delaware is now attempting to enforce. What is relied upon by the complainant in support of his assumption that the company is thus exempted, is section 19 of the Maryland act, incorporating the Delaware and Maryland Railroad Company. By that section, that company was declared to be exempt from the imposition of any tax or burden, by the States assenting to the law, except upon that portion of the permanent and fixed works of said company which may lie within the State of Maryland ; and it was further declared, that any tax which should thereafter be levied upon said section, should not exceed the rate of any general tax which might at the same time be imposed upon similar real or personal property of the State, for State purposes. And when, by its act of July 24, 1835, the Delaware legislature consented to the consolidation of that corporation with its own company, "The Wilmington and Susquehanna Railroad Company," under the corporate name of the latter, it was enacted in the first section that the holders of the stock of the said railroad companies so united, as provided for, "shall hold, possess, and enjoy, all the property, rights, and privileges, and exercise all the powers granted to and vested in the said railroad companies, or either of them" by that act, or by any other law or laws of Delaware or Maryland. So a prior act passed in 1833, whereby the Wilmington and Susquehanna Railroad Company was authorized to form a union with such companies as then were or might thereafter be incorporated in the States of Pennsylvania and Maryland, for the purpose of constructing railroads in said States, so that the capital stock of said companies

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should constitute a common stock, enacted that the respective companies should "constitute one company, and be entitled to all the rights, privileges, and immunities which each and all of them possess, have, and enjoy, under and by virtue of their respective charters." Hence it was argued, that because the Delaware and Maryland company was expressly exempted from any taxation, except upon its fixed and permanent property lying within the State of Maryland, the consolidated company, namely, this defendant corporation, is entitled to the same exemption in the State of Delaware.

To this I cannot assent. The argument, I think, misapprehends the statutes upon which it is built. True, the present company possesses all the rights and immunities which each of its constituents enjoyed before their consolidation. But what were those rights and immunities? Unquestionably they were only such as could be conferred by the States that created the corporation. The legislature of Maryland could not confer upon the corporations created by it any rights in Delaware; nor could it confer upon them any immunity from taxation upon their property within the State of Delaware—I mean any immunity from Delaware taxation; and it made no attempt to do so. Section 19 of the act of 1835 refers to exemption from Maryland taxation, and to no greater. That was the right, the privilege, the immunity, possessed by the Delaware and Maryland Railroad Company, and that right or immunity belongs now to the consolidated company. The language of the act authorizing a union of the companies is not that they shall, when united, have all the rights and immunities in this State, which each of them has in the State by which it was chartered. The purpose was not to extend any of the powers or privileges possessed by the several companies, but to give them, as they were, collectively to the united com-

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pany. In other words, it was intended that the consolidated company might exercise, within Maryland, the rights of the Maryland corporations, and enjoy their privileges, and, within Pennsylvania, possess the rights and privileges of the former Pennsylvania company. Such I understand to have been the construction adopted by the supreme court in *Philadelphia & Wilmington R. R. Co. v. Maryland*, 10 *How.* 376. The act of Maryland which authorized the two companies of that State to unite with the companies of the other States, enacted that the new corporation—that is, the consolidated one—should be entitled, within that State, to all the powers and privileges and advantages, then belonging to the two Maryland corporations. In commenting upon this, Chief Justice TANEY remarks as follows: “Now as these companies held their corporate privileges under different charters, the evident meaning of this provision is, that whatever privileges and advantages either of them possessed, should in like manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place and possess the powers, rights, and privileges they had severally enjoyed in the portions of the road which had previously belonged to them.” I hold, therefore, that there is in the charter of the present defendant corporation, no express exemption from liability to taxation by the State of Delaware.

And I can find nothing in any of the legislative acts relative to this company (*viz*: acts that gave it its existence), which, in my opinion, would justify me in holding it impliedly exempt from such taxation. Any implication, to have such an effect, must be a necessary one; every presumption is against it. The right to tax all property of natural and artificial persons within a State is an attribute of State sovereignty. Conceding now, as I must, in view of past decisions, that it may

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be partially surrendered, it must still be ruled that as the right is essential to the existence of the body politic, nothing less than that which is equivalent to an express surrender of it, by a binding contract, will avail to enable any person or corporation successfully to assert an exemption from liability to its exercise. Without attempting to cite even a title of the cases in which this principle has been asserted, I mention two : *Providence Bank v. Billings*, 4 *Pet.* 503 ; *Railroad Company v. Maryland*, 10 *How.* 376.

What is relied upon by the complainants as raising an implication of exemption, are the following provisions of the acts already mentioned. By the Delaware act of June 18, 1832, which incorporated the Wilmington and Susquehanna Railroad Company, the capital stock was defined to be four hundred thousand dollars, and the company was required to pay annually into the treasury of the State a tax of eight per cent. on all dividends which might exceed six per cent. on the capital stock actually paid in. By the supplement to this act, passed July 24, 1836, this provision respecting a tax on dividends was repealed, and it was enacted that the company should pay annually into the treasury of the State a tax of one-quarter of one per cent. on the capital stock thereof, of four hundred thousand dollars, the tax to be paid semi-annually. By a further supplement, passed June 27, 1836, the company was authorized to increase its capital stock to an extent not exceeding three hundred thousand dollars, with a proviso that the right of taxing the said sum when it should become a part of the capital stock should be reserved to the legislature. As all the privileges and immunities of this company have devolved upon the now existing company, it is argued that the stipulation that the Wilmington and Susquehanna Company should pay a tax of one-quarter of one per cent. on its capital of four hundred thousand dollars amounts to a

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contract that it shall not be liable to further taxation ; and that, consequently, the present defendant corporation is protected to that extent.

To this I cannot accede. The act of 1835 does not declare that no other taxation shall be imposed, or that the power of the State is exhausted ; nor is such the necessary implication from what was said. Certainly it is not to be inferred from the imposition of a tax that no additional tax shall be laid ; and I cannot perceive that it makes any difference whether the tax is imposed by general law, or reserved in a contract obtained from the State. All persons dealing with the State are presumed to know the character of the party with whom they are dealing ; and, if they are obtaining a grant of a franchise, that the grant is always construed strictly against the grantee. In *Commonwealth v. Eastern Bank*, 10 *Barr (Pa.)*, 422, it was decided, that a bank which had been chartered under a general law that prescribed the payment of a specified tax on its dividends, was subject to a later general law increasing the rate of taxation, and that the later law, as applied to the bank, was constitutional.

I agree that the reservation in the act of 1836, of a right to tax the additional stock authorized, tends to awaken suspicion that the legislature had some doubts whether, without the reservation, any tax could be imposed additional to that spoken of in the act of 1835. But this is not enough to overcome the presumption that there was no intention in either act to destroy the right of the State to prescribe such taxation as its necessities might require.

It has been argued that when a charter has been granted to a company, and a bonus has been exacted for it, the franchises and property of the company cannot be taxed any further than is provided in the charter, because, if I understand the argument correctly, the company is a purchaser of its rights in such a case.

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If this were so, the argument does not apply to the case in hand, for no bonus was exacted from this company. It cannot be said that the tax laid of one-quarter of one per cent. was in any proper sense a stipulation for a bonus. But I do not agree that a company which has paid a bonus for its charter, is thereby freed from liability to taxation. There is no reason that will bear examination for any such doctrine. If there is a bonus paid, it is only a part of the price paid for the franchise granted. It is measurably the consideration for the State's contract. But every charter to an improvement company is based upon a consideration given, or to be given, by the grantee. If it were not so it would not be a contract. It may not be a pecuniary consideration paid into the State treasury. It may be money expended for a public use, the construction of a highway, or something in which the public has an interest. What matters it, then, that the payment of a bonus makes the grantee of a franchise a purchaser, when all grantees of corporate franchises are purchasers? There is a consideration given in all cases. The *quantum* of the consideration is quite immaterial. The grantee of land from a State is commonly a purchaser for a consideration paid. He holds his title by contract. No one ever doubted that he takes the land subject to taxation. Why should it be otherwise with the grantee of a franchise? Land is no more property than a franchise. This has often been decided. Both are subject to the right of eminent domain. *Bridge Co. v. Dix*, 6 *How.* 507 ; 17 *Conn.* 454 ; 3 *Paige*, 45. Both in grants of land and in grants of franchises, the subjects of the grant are understood to be held under the government, not against it, and, of course, they are subordinate to the powers of the government, except so far as those powers have been unmistakably relinquished.

And I do not find that the authorities sustain the

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doctrine that the payment of a bonus for a charter protects the grantee of a franchise from all taxation, except such as the State has reserved in the charter itself a right to impose. The Ohio Bank cases, 16 & 18 *How.* certainly decide no such thing. In those cases it appeared there had been an express exemption, and what would have been the effect of a bonus paid was not considered. What was decided in *Jefferson Branch Bank v. Skelly*, 1 *Black*, 436, was, that the charter of a bank is a franchise not taxable as such, if a price has been paid for it, which the legislature has accepted, with the declaration that it is to be in lieu of all other taxation. On the other hand, in *Bank of Pennsylvania v. Commonwealth*, 19 *Pa. St.* 144, where it appeared that by the charter of a bank it had been required to pay a very large bonus, it was, nevertheless, subject to an increased tax subsequently imposed. It was ruled that the bank acquired no privilege, exemption, or immunity, under its charter, except what was given expressly and unequivocally ; that corporate privileges are never implied ; that the legislature can only disarm the State of any portion of the sovereign power which belongs to her, by words showing that to be her intention so plainly that they cannot be misunderstood ; that the taxing power is an incident of the State's sovereignty, and that the State does not lose it by granting a charter which says nothing on the subject. This was said of a charter that exacted a bonus of hundreds of thousands of dollars.

The case of *Gordon v. Appeal Tax Court*, 3 *How.* 133, has been called to my attention. It must be admitted that Mr. Justice WAYNE, who delivered the opinion of the court, seems to have thought the acceptance of a proffered bank charter, which requires the payment of a bonus, constitutes a contract that binds the State not to impose any further tax upon the franchise granted, though not interfering with the right

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to tax the capital stock of the company. In answer to the question, "Why, when bought, the franchise, as it becomes property, may not be taxed as land is, which has been bought from the State?" he said, "The reason is that every one buys land subject in his own apprehension to the great law of necessity that we must contribute from it and all of our property, something to maintain the State; but as to a franchise for banking, when bought, the price is paid for the use of the privilege while it lasts, and any tax upon it would be substantially an addition to the price." I confess that I do not feel the force of this attempted distinction. I do not see why, if a tax is an addition to the price in one case, it is not in the other. The truth is, it is in neither; for the purchaser in neither case has bought anything more than a right to enjoy the subject of the grant subordinately to the constitutional claims of the government. That is all that is meant by property held in civil society. But the remarks of Mr. Justice WAYNE upon the subject were *obiter dicta*. The thing decided in the cause was that the State of Maryland could not impose a tax, not upon the bank either for its franchise or its capital, but upon its stockholders for the shares held by them individually, the charter of the bank having been granted in consideration of a bonus paid, and containing an express stipulation that the faith of the State was pledged not to impose upon the bank any further tax or burden during the continuance of its charter under the act.

My attention has been directed to no case which maintains the doctrine for which the complainants contend. It is sustained neither by reason nor authority. If, therefore, it be true (which I do not concede) that the clause in the Delaware act of Assembly, passed July 24, 1835, which imposed on the Wilmington and Susquehanna Railroad Company a tax of one-quarter of one per cent. on its capital stock, was the exaction of a bonus, it does not, in my opinion, deprive the State of

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the power to levy upon the corporation defendant in this case additional taxes.

I come, then, to the conclusion that there is nothing in the act of Assembly of April 8, 1869, so far as it imposes upon the company an additional tax of one-fourth of one per cent. on the cash value of its capital stock, and a tax of three per cent. on its net earnings, that is in conflict with the constitutional inhibition that no State shall pass a law impairing the obligation of contracts. With the fairness of such taxation I have nothing to do. The question before me is exclusively one of legislative power, and I think the legislature has not thus far transcended its legitimate authority.

The remaining question is attended with more difficulty. I refer to the legality of the tax imposed by section 3 of the act. That section enacts from the company the payment every year of a tax of one hundred dollars *for the use* in the State of each locomotive, owned in whole or in part by the company, and at any time during the preceding year used by the company, within the State. A similar tax, though less in amount, is imposed *for the use* in the State of each passenger, freight, and truck car ; *for the use* of the rolling stock generally. This is not a tax upon the property of the company, nor upon its franchise generally. It is not a tax upon the locomotives or the cars. It is called a tax upon their *use* in the State ; but it seems to be rather a license fee exacted for the privilege of using rolling stock. Can such a burden be imposed ? I have said the franchise can be taxed as property, and that the property acquired or held under it is taxable ; but it may be doubted whether such an exaction as this can be regarded as a tax either on the franchise or on the property of the company. Can the State, after having granted to the complainants the right to run locomotives in and through its territory freely, and

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also the right to use all the ordinary means of conveying freight and passengers, compel the payment of license fees for the use of those ordinary means of transportation, and that not for police purposes? Can it say to the grantees of this franchise, "True, you have purchased the right to use locomotives and cars; but if you use them you shall pay an additional price"? And is not a license fee thus exacted an additional price? I do not propose, however, to answer these questions or to decide that such an exaction is or is not an impairing of the obligation of the contract between the company and the State, for, in my opinion, the law of the State that attempts to impose this tax or duty is invalid for other reasons.

In the statement of facts to which the parties have agreed, I find the following. It is agreed "that much the larger portion of the locomotive engines, passenger cars, freight cars, and trucks, belonging to the Philadelphia, Wilmington, and Baltimore Railroad Company, were used during the year 1869 (the year for which this tax is attempted to be collected), on the aforesaid main line of railroad of the said company, extending from the city of Philadelphia, in the State of Pennsylvania, through the State of Delaware to the city of Baltimore, in the State of Maryland, and for the purpose of transporting persons and property in and by a continuous course of transportation through, from, and into the said State of Delaware; that a number of engines, passenger and freight cars, and trucks, were used during the said year, on the main line from Philadelphia to a point about a mile beyond Wilmington, and thence on the line of railroad known as the Peninsular line, extending through Delaware and a part of the eastern shore of Maryland to Christfield, and the several branches therefrom, and that very few of either the engines, cars, or trucks, of the said com-

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pany, were used exclusively within the State of Delaware during the year 1869."

It is, therefore, admitted, that the tax or license fee is laid upon the use of the locomotives, cars, &c., mainly employed in transporting persons or property through the State from other States, or into it, or out of it. Such an imposition is, in my opinion, a regulation of commerce between States. It is a prescription that passengers and merchandise shall not be carried through the State except upon certain conditions. If the tax can be imposed at all, it may be to any extent. It has often been said that when a right to tax exists it is unlimited by anything but the discretion of the legislature that imposes it. This, of course, is to be understood as applying only to cases where the State has not by contract restricted its power. Said Chief Justice MARSHALL, in *McCullough v. Maryland*, 4 *Wheat.* 316: "An unlimited power to tax involves necessarily a power to destroy, because there is a limit beyond which no institution and no property can bear taxation. A question of constitutional power can hardly be made to depend on a question of more or less. If the States may tax, they have no limit but their discretion, and the bank must, therefore, depend on the discretion of the State for its existence." If this is so, the power to tax the use of all means or instruments of conveyance of persons or property through the State is the same as a power to prevent such use entirely. There is only a difference in the extent of its exercise.

Now, I think it can hardly be maintained that a law, declaring that merchandise and passengers shall not be carried on a public highway by locomotives or cars, from Philadelphia through the State of Delaware into Maryland, would not be a manifest regulation of inter-State commerce, quite as truly such as was the embargo of 1807 a regulation of foreign commerce.

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And if the enactment of such a law would be beyond the constitutional power of a State, the act of the Delaware legislature, of which the plaintiffs complain, must be equally so, for it differs only in degree. And it is not the less a commercial regulation, because it does not discriminate between transportation exclusively domestic and that which extends into other States. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction cannot be changed by adding to it similar conditions for allowing transportation wholly within the State. I need hardly say, that a tax upon the ordinary and lawful means of transportation is practically a tax upon the thing transported.

Holding, then, as I do, that the Delaware statute of April 8, 1869, was an attempted regulation of commerce among the States, I come next to the question whether it was beyond the power of the State to make. I shall not enter at large upon a discussion of the much debated question, how far the power given to Congress by the Constitution to regulate commerce among the States is exclusive. Certain it is, that in the earlier decisions of the supreme court it was said to be unlimited, and so exclusively vested in Congress that no part of it can be exercised by a State, except the power to regulate commerce completely internal; that is, entirely within a single State. *Gibbons v. Ogden*, 9 *Wheat.* 1; and the *Passenger Cases*, 7 *How.* 283.

I am aware that it has often been argued, and sometimes intimated in decisions, that so far as Congress has not legislated on the subject, the States may regulate commerce, at least internal commerce. Of this I remark in passing, that if they can, it is difficult to see why they may not add regulations to foreign commerce beyond those made by Congress, for the power over both is vested in the Federal legislature by the same

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words. But I apprehend it will be found on examination that the cases that have sustained State laws alleged to have been regulations of inter-State commerce have been those that related to bridges or dams across streams wholly within a State, or other kindred subjects—things only in a restricted sense commercial subjects. *Wilson v. Blackbird Creek Co.*, 2 *Pet.* 250; *Gilman v. Philadelphia*, 3 *Wall.* 713. They are exceptional. The subjects are such as in the last mentioned case it is said “can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively.” But, without pursuing this subject further, it may safely be said that none of them are like the present. They admit, and some of them assert, that wherever subjects of the power to regulate commerce are in their nature national, *or admit of one uniform system or plan of regulation*, may justly be said to be of such a nature as to require exclusive legislation by Congress. Surely passage and transportation through a State are of this nature. If not, it is unfortunate. It is of national importance that in regard to such subjects there should be but one regulating power, for if one State can directly tax persons and property passing through it, or indirectly, by taxing the use of means of transportation, every other may; thus commercial intercourse between States remote from each other may be destroyed. The produce of Western States may be effectually excluded from Eastern markets; for though it might bear the imposition of a tax by one State, it would be crushed under the weight of many.

I have already protracted this opinion to such a length that I do not feel justified in referring to many of the decided cases. In *Almy v. California*, 24 *How.* 169, it was ruled by the supreme court that a law of the State imposing a stamp duty upon bills of lading for gold or

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silver transported from that State to any port or place out of the State, was substantially a tax upon the transportation itself, and was unconstitutional. It is true the decision was rested on the ground that it was a tax upon exports; and, subsequently, in *Woodruff v. Parham*, 8 *Wall.* 123, the court denied the correctness of the reasons given for the decision; but they said at the same time the case was well decided for another reason, viz: that such a tax was a regulation of commerce—a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in *Crandall v. Nevada*, 6 *Wall.* 35, and with the authority of Congress to regulate commerce among the States. In the very recent case of *Crandall v. Nevada*, 6 *Wall.* 35, it was held that a special tax imposed by the State on railroad and stage companies for every passenger carried out of the State by them, was a tax on the passenger for the privilege of passing through the State by ordinary modes of travel, and not simply a tax on the business of the companies. Hence it was ruled that the power of a State to impose such a tax is inconsistent with rights conferred by the Constitution on the Federal government and on the people, and consequently that no State can lay such a tax. The majority of the court, indeed, declined to put their decision upon the ground that the tax was a regulation of inter-State commerce, and as such, beyond the reach of the State, but all the judges agreed that the State law was unconstitutional and void. The chief justice and Mr. Justice CLIFFORD thought the judgment should have been placed exclusively on the ground that the act of the State legislature was inconsistent with the power conferred upon Congress to regulate commerce among the several States, and I do not understand that the other members of the court held de-

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cisively that it was not thus inconsistent. The case, in any view of it, decides that a State cannot directly or indirectly tax persons for passing through or out of it. That is enough for the case I have before me. The Delaware statute of April, 1869, does indirectly levy a tax upon both persons and property for transit through the State, into it, and out of it. It is, therefore, in my opinion, so far in conflict with the Constitution of the United States.

I shall, therefore, enjoin against any steps for the assessment, collection, or payment of the tax prescribed by section 21 of the act of April 8, 1869, namely, the tax for the use of locomotives, passenger cars, freight cars, and trucks, and I shall refuse the injunction prayed for to prevent the collection and payment of the tax prescribed by section 15, upon the actual cash value of every share of the capital stock of the company defendant, and I shall also refuse an injunction against the collection and payment of the tax prescribed by section 20 upon the net earnings or increase of the company.

Decree accordingly.

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FAREZ' CASE.

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## FAREZ CASE.

*Circuit Court, Second Circuit ; Southern District of  
New York, June T., 1870.*

## EXTRADITION.—EVIDENCE AND PROCEDURE.

The complaint in a foreign extradition case is not defective because it does not aver personal knowledge of the deponent, being a foreign consul, of the facts charged. An official statement of the charge, by a consul, made with distinctness enough to enable the accused to understand what is charged, is a sufficient complaint.

The complaint in a foreign extradition case need not show that any warrant has been issued against the accused, abroad.

The warrant issued by a commissioner in a foreign extradition case, need not show that the commissioner was appointed to issue the particular warrant. An averment of his authority to issue such warrants generally, is good.

Under the convention with Switzerland, 11 *Stat. at L.* 598, extradition is warranted, when one of the specified crimes has been committed, if it is subject to infamous punishment by the laws of the country where it was committed. It need not also be infamous by the laws of the United States.

There is no rule of procedure in foreign extradition cases, which entitles the accused to cross-examine the complainant, before any evidence has been offered on behalf of the prosecution.

When, upon the hearing of a foreign extradition case, depositions of witnesses examined abroad, authenticated in the manner prescribed by the act of June 22, 1860, 13 *Stat. at L.* 84, are produced on the question of criminality, the judicial authorities here are bound to give them the same effect as would be given to the testimony of the witnesses if personally present and testifying. Thus, if the charge is forgery, and the depositions show that the witnesses had the alleged forged papers before them, no objection can be heard that such papers are not produced upon the examination.

In reviewing the proceedings in a foreign extradition case, upon *habeas corpus* and *certiorari*, the court cannot pass, in any manner, upon

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the discharge of the executive functions of the president. If the mandate of the president, authenticated by the State department, shows that the president considers that satisfactory evidence has been produced that the person named stands charged with the crime, the court can in no manner question the evidence on which the president came to that conclusion.

The various rules which govern the authentication of the papers requisite or admissible in proceedings of foreign extradition,—stated and explained.

In foreign extradition cases, the examination of the offender must be conducted according to the laws of the State in which the proceeding is had, as respects all particulars which are not specially regulated by a statute of the United States.

If the laws of the State entitle a person under preliminary examination for a crime against those laws to testify in his own behalf,—*a. g.*, *N. Y. Laws of 1869*, ch. 678,—then a person under examination with a view to his extradition is entitled to be so examined.

To justify holding a person accused of crime against a foreign government, for extradition, evidence furnishing good reason to believe that the crime alleged has been committed by the person charged, is necessary. But the examining magistrate should not require the full proof which would insure a conviction upon a trial in chief.

Where, upon proceedings to revise the action of an examining commissioner, in committing a person charged with crime against a foreign government, for extradition, it appeared that the commissioner erred in refusing to permit the prisoner to be examined on his own behalf,—*Held*, that the prisoner must be discharged from custody under the final commitment; but that he was properly held under the warrant of arrest, and must be remanded to the custody of the marshal thereunder, and the examination should proceed anew.

Hearing upon writs of *habeas corpus* and *certiorari*.

BLATCHFORD, J.—In this case a writ of *habeas corpus* and writ of *certiorari* have been issued to review the proceedings which have taken place before Kenneth G. White, Esq., a United States commissioner, in reference to the application of the authorities of the Swiss Confederation for the extradition of the petitioner, Francois Farez. The proceedings which took place before the commissioner have been brought

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before me, and the questions involved have been fully discussed by the respective counsel.

It appears by the record that the proceedings went on before Commissioner WHITE by consent, he not having been the commissioner who issued the warrant of arrest, and that before the matter was proceeded with at all before Commissioner WHITE on the part of prosecuting party, a motion was made before the said commissioner by the accused, to dismiss the complaint and warrant on several grounds.

The first ground was, that the complaint was insufficient, because it did not contain anything more than an official statement on the part of the deponent, as consul, &c., that the prisoner was charged with the crimes stated, and did not contain the express personal averment to that effect, required by law. I do not think there is anything in that objection. Necessarily, in carrying out the provisions of extradition treaties, the complaint must, in many cases, be made by the representative of the foreign government; and all that can be required is that it shall be sufficiently specific, clear, and distinct in its averments to enable the party accused to understand precisely what it is he is charged with. The complaint made in this case by the Swiss consul in his official capacity, he not pretending to any personal knowledge of the matters set forth in the complaint, contains all the necessary and proper averments to enable the party accused to understand what offenses he is charged with having committed; and there is no force in the objection that it does not contain anything but an official statement.

The second objection was, that it did not appear by the complaint by what magistrate abroad the warrant against the prisoner had been issued, so as to enable the commissioner to decide whether such magistrate had authority in the premises. The complaint states that a warrant of arrest against the prisoner, on

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account of the crimes specified in the complaint, has been issued by the competent and proper judicial authority for the purpose, in the jurisdiction of the Swiss Confederation. If the averment in question were a material averment, undoubtedly the one found in this complaint would be insufficient. But it is not a necessary preliminary step to an investigation under an extradition treaty, that a warrant shall have been issued abroad. Therefore, the averment in question is surplusage.

The third objection was, that it did not appear by the warrant that the commissioner was appointed by the circuit court of the United States for the purpose of issuing the same. That objection was not urged on the hearing before me. The point involved in the objection is, that the warrant does not show that the commissioner was appointed by the circuit court to issue this particular warrant. That is true; but it is not necessary that it should so appear. It does appear, on the face of the warrant, that he was appointed to issue warrants in all cases of extradition falling under the provisions of the acts of Congress of August 12, 1848, and June 12, 1860. The act of 1848, 9 *Stat. at L.* 302, applies to any treaty or convention for extradition between the government of the United States and any foreign government, and gives the power to issue a warrant to any commissioner authorized so to do by any of the courts of the United States. This warrant avers that the commissioner who issues it is a commissioner appointed by the circuit court of the United States for the Southern District of New York, and is a magistrate, and is a commissioner specially appointed to execute the act of August 12, 1848, and the act of June 22, 1860. That is sufficient.

The fourth objection was, that the complaint did not allege that the crime in question was punishable by infamous punishment in the United States, and that it

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was necessary that the crime should be so punishable to bring it under the treaty. The averment of the complaint in that respect is, that the crimes alleged are contrary to the laws of the Swiss Confederation, and are by such laws subject to infamous punishment, and to punishment by imprisonment in the State prison. There is no averment that they are subject to infamous punishment by the laws of the United States. The convention for extradition between the United States and Switzerland, 11 *Stat. at L.* 593, says, that persons shall be delivered up according to the provisions of the convention, who shall be charged with the crimes therein specified, "when these crimes are subject to infamous punishment." My interpretation of this provision is, that when one of the specified crimes has been committed, and the extradition of the person who has committed it is demanded, it is sufficient if such crime is subject to infamous punishment in the country where it was committed, without its being necessary that it should be also subject to infamous punishment in the country from which the extradition of such person is demanded. The complaint is, therefore, sufficient in this respect, without regard to the question whether it is necessary to make any averment of the kind in the complaint, which perhaps may be doubtful.

The fifth objection was, that there was no evidence that the supreme power of the Swiss Confederation had made a demand on the government of the United States for the extradition of the prisoner. That objection was cured by the production afterwards of the mandate from the president of the United States, which sufficiently showed that a demand for the extradition of the prisoner had been made by the only authority which the government of the United States is called upon to recognize as representing the Swiss Confederation.

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The objections referred to were all of them properly overruled by the commissioner. He also properly overruled a motion, based upon those objections, to dismiss the proceedings. Then the case on the part of the prosecution was commenced, and the counsel for the prisoner claimed the right to cross-examine the complainant before any other evidence should be offered on the part of the prosecution. That claim was overruled by the commissioner, and an exception to such ruling was taken. I see no objection whatever to that ruling. The prisoner had the right to call the Swiss consul, who was the complainant, as a witness, and examine him at any stage of the case, but he could not properly claim the right to cross-examine him before any other evidence was offered, when it appeared on the face of the complaint that the consul did not pretend to have any personal knowledge of the matters stated in the complaint.

Then the complaint, and the sworn depositions attached thereto, made before the judicial authorities in Switzerland, were offered in evidence before the commissioner. The counsel for the prisoner objected to their admission in evidence on several grounds. The first was, that the mandate issued from the State department had not been produced and put in evidence. The mandate was then produced by the counsel for the prosecution, and given to the commissioner, and it is now before me. The return of the commissioner to the writ of *certiorari* does not state that the mandate was put in evidence, but as the objection taken was that it had not been put in evidence, and as it was produced and given to the commissioner, it must be intended that it was put in evidence for all practical purposes. The record does not show that any objection was taken to the competency of the mandate as evidence, after it had so been given to the commissioner ; and I regard the mandate as sufficient in form.

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The second objection taken to the admissibility of the papers from Switzerland was, that the charge being forgery, the alleged forged papers ought to be produced before any other evidence could be introduced. The objection is not well taken. The evident intention of Congress in the act of June 22, 1860, 12 *Stat. at L.* 84, as was held by Mr. Justice NELSON, Judge SHIPMAN, and myself, in the case of *In re Henrich*, 5 *Blatchf.* 414, was to enlarge the field of evidence in these cases. As was stated by Judge SHIPMAN in his opinion in that case: "The act of June 22, 1860, enlarges the class of documentary evidence which may be adduced in support of the charge of criminalty." He further said that, "in regard to the depositions upon which the foreign warrant of arrest may have issued, embraced in section 2 of the act of August, 1848, it provides for the admission of *any* depositions, warrants, or other papers, or copies of the same, which are so authenticated that the tribunals of the country where the offense was committed would receive them for the same purpose." It is also quite apparent that when these depositions, authenticated in such a manner as to entitle them to be received for similar purposes by the tribunals of Switzerland, are received in evidence here on the question of the criminality of the prisoner, as they are entitled to be, under the act of 1860, the judicial authorities here are bound to give to them the same effect as if the witnesses themselves were personally present, testifying here. In the present case it appears, by the papers from Switzerland, that on the occasion of the giving of testimony by the witnesses whose depositions were taken, copies of which are produced as evidence, the alleged forged instruments were produced and shown to them, and they examined them, and examined their signatures to them, and stated that they did not know such signatures. On this state of facts, it is quite clear that there is noth-

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ing in the objection taken, 'because the depositions produced are the depositions of witnesses who had the alleged forged papers before them at the time of giving such depositions. The case stands now precisely as if the witnesses had been examined in person before the commissioner, and the alleged forged papers had been produced to them before him.

The third objection was, that the charge set forth in the complaint was subsequent in date to that set forth in the mandate of the president, and that therefore the charge before the commissioner was another and a different one from that set forth in such mandate. There is no force in this objection. The mandate was issued on December 9, 1869. It alleges that the political agent and consul-general of Switzerland has made application to the government of the United States, for the arrest of Francois Farez, charged with the crime of forgery and embezzlement, and alleged to be a fugitive from the justice of Switzerland, and believed to be within the jurisdiction of the United States. All that this language implies is that, before December 9, 1869, Farez had committed the crime of forgery and embezzlement in Switzerland, and had fled from there to the United States. The evidence that was placed before the president is something with which this court has nothing to do. This court cannot pass, in any manner whatever, upon the discharge of the executive functions of the president. It is sufficient that the president, as is evidenced by a paper coming through the recognized authority of the government, the secretary of state, has come to the conclusion that satisfactory evidence has been produced to him that Farez is charged with this crime. This court can in no manner examine into the question as to the evidence on which the president came to that conclusion. The papers put in evidence before the commissioner show that, although the complaints of the persons who made the charge before the

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magistrate in Switzerland were made on December 14, 1869, and the magistrate proceeded to make further investigations in regard to the matter on January 21, 1870, yet the offenses to which all the papers relate were committed, if at all, when the forged instruments were passed away by Farez, namely, in August, 1869. Therefore, in no proper sense does the complaint set forth offenses subsequent in the date of their commission to those set forth in the mandate. The complaint sets forth offenses committed at some time in August, 1869, and the mandate of December 9, 1869, only refers to an offense previously committed. The mandate is, indeed, very general, but the complaint which was immediately put before the officer who issued the warrant is specific and clear, and there is nothing to show that the mandate and the complaint refer to different offenses. The mandate authorizes an arrest for forgery, and the offense of forgery is the offense set forth in the complaint and in the warrant of arrest.

The fourth objection to the documents was that they were not properly legalized. The objection is very general. It does not properly state wherein the legalization was imperfect ; but I have considered every question raised upon the legality of the papers.

It was held in the case of *In re Henrich* that papers of the character of those here presented are admissible under the act of 1860, when properly authenticated, and that the act intends to enlarge the class of documentary evidence which may be adduced in support of the charge of criminality, and, in addition to the depositions on which a foreign warrant of arrest may have issued, provides for the admission of any depositions, warrant, or other papers or copies of the same, which are authenticated in a certain manner. Therefore, it is no objection to these papers that they do not appear to have been papers on which a warrant of arrest was

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issued abroad against the prisoner. The only question is, as to whether the papers are properly authenticated.

The act of 1860 provides that the certificate of the principal diplomatic or consular officer of the United States resident in Switzerland shall be proof that any paper or other document offered in evidence is authenticated in the manner required by that act. The diplomatic or consular officer must state that the papers are authenticated so as to entitle them to be received for similar purposes by the tribunals of Switzerland; that is, entitled to be received by the tribunals of Switzerland for similar purposes for which the papers mentioned in section 2 of the act of 1848 are to be received, namely, for the purpose of being evidence of the criminality of the person apprehended.

The certificate in this case of the minister resident of the United States in Switzerland, Mr. Rublee, dated February 5, 1870, certifies that "the foregoing copies of the warrant, depositions, and other papers are legally and properly authenticated so as to entitle them to be received for similar purposes by the tribunals of the Swiss Confederation, and to be received by the said tribunals for the purposes and similar purposes mentioned in section 2 of the act of Congress entitled 'An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders,' approved August 12, 1848."

This certificate follows the language of the act of 1860. The same objection that is made to this mode of certification was made to the certificate in the case of *In re Henrich*. The objection was there taken that the certificate of the minister did not state explicitly that the paper was admissible by the tribunals of the foreign country in support of the charge of criminality, or as evidence of the criminality of the prisoner. From the report of that case, it appears that the certificate

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stated as this one does, that the paper was receivable for "similar purposes." On that subject the court, in that case, after referring to the act of 1848 as stating that the purposes for which the documentary evidence is made admissible are to support the charge of criminality, says that the act of 1860 declares that the documentary evidence which it makes admissible is to be received for the same purposes mentioned in section 2 of the act of 1848—that is, in evidence of the criminality of the prisoner. It further says: "The meaning of the certificate is perfectly obvious, when considered in reference to its object, and in connection with the certificates of the Prussian officials. The latter declare it to be a valid piece of evidence touching the charge of criminality, which it embraces and sets forth with particularity." In the present case, the certificate of the minister refers to the papers as being legally and properly authenticated, so as to entitle them to be received for similar purposes by the tribunals of the Swiss Confederation. The authentication which is thus referred to by the minister, is a certificate made by the chancellor of the Swiss Confederation. He certifies to the signature of the chief of the State chancery of the canton of Berne, in Switzerland, and to the authenticity of the seal of such State chancery. He adds: "I moreover certify that Mr. JUSTIN BROSSARD, president of the tribunal of the District of the Franches Montagnes, Canton Berne, Switzerland, is, according to the conditions of the actual legislation of that canton of Switzerland, competent to institute penal examinations of the nature of the one which, conformably with the foregoing papers, was opened and carried on agreeably with the forms of legislation adopted in the Canton Berne, against Francois Farez, blacksmith, burgher of Epiquerez, Canton Berne, and latterly established at Les Bois, as an inn-keeper, in said canton of Byrne, for forgery, and the uttering

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of papers forged by him ; that, in particular, the aforesaid Mr. Justin Brossard, in his said capacity of president of the tribunal of the district of the Franches Montagnes, is legally authorized, and, in said district, the only judge competent to admit complaints against crimes of the nature of those which Farez has committed, to issue warrants of arrest and to cause them to be executed, to hear witnesses, appoint experts, and receive legal oaths ; that further, the interrogatories and opinions of experts, here above reported by said Justin Brossard, would be amply sufficient to warrant the arrest of Francois Farez, and his committal for trial and judgment before the tribunals of the canton of Berne, if he were in Switzerland, for the crime of forgery and uttering forged papers, of which he is accused." That is a certificate, in substance, that the interrogatories and opinions of experts contained in these papers are receivable before the tribunals of the canton of Berne, in Switzerland, as evidence of the criminality of Farez, because it expressly states that they would be sufficient to warrant his arrest and committal for trial. If they are sufficient for that purpose, it necessarily follows that they must be receivable in evidence on the question of his criminality.

Taking the certificate of the minister and the chancellor together, there is a substantial compliance with the act of 1860. And even if the certificate of the chancellor is to be regarded as speaking only of the interrogatories and the opinions of experts as being sufficient to warrant the arrest of Farez and his committal for trial, and as not referring to the complaints and the depositions (which form part of the papers) of the parties whose names were forged, still the certificate of the minister, which covers by name "the warrant, depositions, and other papers," covers complaints, the depositions, the interrogatories, the opinions of the experts, and their report, and all other documents. Therefore,

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on the certificate of the minister by itself, there is a sufficient compliance with the act of 1860, irrespective of anything that is found in the certificate of the chancellor.

The further objection was taken that each one of these papers ought to have been certified by itself. But I think that these papers form substantially one proceeding and one document. Each paper refers to the papers which precede it, and they are all as much connected together as are the papers which form the record in a suit in a court of the United States. All of them are proceedings before the same magistrate, in the same tribunal, and relate to the same transaction, and I think they are properly certified as one paper, and were properly admitted in evidence.

The warrant of arrest issued against the prisoner in Switzerland, and translations of the foreign documents, and the statutes of the State of New York, were then put in evidence without objection. It was then admitted by the counsel for the prisoner, that the prisoner was Francois Farez, and that he was a farrier and hotel-keeper at Les Bois, Switzerland.

The prosecution then rested, and the counsel for the prisoner moved to discharge the prisoner on several grounds. The first was that it ought to be shown that the punishment for the offense charged was infamous, and that that had not been shown. I think that the proper construction of article 14 of the convention with the Swiss Confederation is, that there can be no extradition of a person charged with any of the crimes enumerated in that article, unless such crime is subject to infamous punishment in the country where the crime is committed.

It was, therefore, necessary to show, in this case, that the crime with which Farez was charged was subject to infamous punishment in Switzerland. That was, in my judgment, sufficiently shown. The offense

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charged was clearly, according to the papers, an offense against the laws of the canton of Berne, just as here it would have been an offense against the laws of the State of New York. The complaint and the warrant issued against the prisoner in Switzerland, sufficiently show that the crimes charged are punishable there by imprisonment in the State prison, which must be held to be an infamous punishment.

The second ground was that the charge before the commissioner was not the same as that set forth in the mandate. This objection has been already disposed of.

The third ground was that the notes alleged to have been forged had not been produced. That objection, also, has been already passed upon.

The fourth ground was that the evidence contained in the documents produced was not sufficient to warrant the holding of the accused. I think that it was sufficient.

The motion to discharge the prisoner was denied by the commissioner in respect to each of the grounds stated. The counsel for the defense then called the prisoner as a witness, and the counsel for the prosecution objected to his being sworn and examined, on the ground that he was incompetent as a witness. The commissioner sustained the objection, and in that respect, I think, he erred. He ought to have permitted the prisoner to be examined. The proceedings before a magistrate, in this district, in a case of extradition, must be conducted according to the laws of the State of New York in the particulars in which such proceedings are not specially regulated by a statute of the United States. By an act of the legislature of the State of New York, passed May 7, 1869, *N. Y. Sess. Laws of 1869*, ch. 678, it is provided that in all proceedings in the nature of criminal proceedings, in any and all courts, and before any and all officers and persons acting judicially, a person

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charged with the commission of a crime shall at his own request, but not otherwise, be deemed a competent witness. In this case, the counsel for the defense called the prisoner himself as a witness. It must be intended that this was done at the request of the prisoner, acting through his counsel. I think the prisoner had a right to make his statement as a witness. Article 13 of the convention in question provides that the person charged with the crime shall be delivered up only when the fact of the commission of the crime shall be so established as to justify his apprehension and commitment for trial, if the crime had been committed in the country where such person shall be found. Applied to this case, this provision requires that, in order to warrant the commitment of the party for trial, the same evidence shall be required of the fact of the commission of the crime in Switzerland, as would be required of the fact of the commission of the like crime, if it had been committed here. The good sense of this provision requires that the fact of the commission of the crime shall be established in such a manner and according to such forms of proceeding as would be required if the crime had been committed in the country where the person shall be found. The word "country" necessarily, under our form of government, in carrying out the provisions of the convention, means the special political jurisdiction that has cognizance of the crime. In this case, the forms of proceeding that must be observed are those of the State of New York ; and the prisoner must have an opportunity, if he desires, of making his own statement on oath. This view is confirmed by the analogous course of proceeding which exists in respect to the examination of offenders charged with crimes against the United States. It is provided by section 33 of the judiciary act of 1789, that for any crime or offense against the United States, the offender may, agreeably to the usual mode of process, that is, mode of procedure, against

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offenders in the State where such offender may be found, be arrested and imprisoned or bailed, as the case may be, for trial before the proper court of the United States.

It was urged on the hearing, on the strength of an observation made by Mr. Justice NELSON in the case of *Exp. Kaine*, 3 *Blatchf.* 1, 10, that the evidence before the commissioner must be so full as, in his judgment, if he were sitting on the final trial of the case, to warrant a conviction of the prisoner. While I always hesitate to differ with Mr. Justice NELSON in opinion, I am not prepared to adopt this view. It seems to me to be in conflict with the decision in the case of Burr. In that case, Chief Justice MARSHALL sat as a committing magistrate on the question as to whether Burr should be committed for trial for the crime of setting on foot an expedition against the territories of a nation at peace with the United States. The chief justice said, 1 *Burr's Trial*, 11: "On an application of this kind, I certainly should not require that proof which would be necessary to convict the person to be committed on a trial in chief: nor should I even require that which should absolutely convince my own mind of the guilt of the accused; but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof, furnishing good reason to believe that the crime alleged had been committed by the person charged with having committed it." The chief justice acted upon that view, and committed Colonel Burr for trial. The convention, in the present case, says that the fact of the commission of the crime must be so established as to justify the commitment of the accused for trial, if the crime had been committed here. The question before Chief Justice MARSHALL, in the case of Burr, was merely the question whether Burr should be committed for trial, and the question as to the extent to which the

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fact of the commission of the crime must be established. To say that the evidence must be such as to require the conviction of the prisoner if he were on trial before a petit jury would, if applied to cases of extradition, be likely to work great injustice. The theory on which treaties for extradition are made is, that the place where a crime was committed is the proper place in which to try the person charged with having committed it ; and nothing is required to warrant extradition except that sufficient evidence of the fact of the commission of the crime shall be produced to justify a commitment for trial for the crime. In acting under section 33 of the judiciary act of 1789 in regard to offenses against the United States, a committing magistrate acts on the principle that, in substance, after an examination into the matter, and proper opportunity for the giving of testimony on both sides, there is reasonable ground to hold the accused for trial. The contrary view would lead to the conclusion that the accused should not be given up to be tried in the country in which the offense was committed, the country where the witnesses on both sides are presumptively to be found, but should be tried in the country in which he may happen to be found. Such a result would entirely destroy the object of such treaties.

The record shows that a motion was made to the commissioner, on the part of the prisoner, to adjourn the further hearing of the case for a sufficient length of time to allow the prisoner to send for and obtain evidence from Switzerland, to be used on the examination, and that the prisoner be admitted to bail. This motion was denied, and properly ; for no sufficient foundation had been laid for it at that time.

Afterwards, the counsel for the prisoner renewed the motion for an adjournment for a sufficient length of time to allow the prisoner to send for and obtain evi-

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dence from Switzerland, and, in support of such motion, read the affidavits of the prisoner and of another person. The motion was denied, and properly ; for the affidavits do not show that there is any evidence, either oral or documentary, on the part of the prisoner, that exists or is accessible, or is likely to be obtained. No magistrate would, on such affidavits, have been justified in granting the motion. At the same time, if the prisoner desires to be examined himself, or to have any witnesses examined whom he shall produce, he ought to have the opportunity to examine them.

The counsel for the prisoner having stated that he had no other evidence to offer on the part of the defense, the commissioner held that the evidence produced was sufficient to sustain the charge made, and that the prisoner should stand committed, to await the order of the proper executive authority of the United States. Under such commitment, he is now held by the marshal.

I believe I have considered every question which has been raised in the case. I think that the only error which the commissioner made was the one which I have pointed out, of not permitting the prisoner to be examined as a witness for himself. Although, under the laws of the United States, a person on trial for a crime before a petit jury cannot be a witness for himself, yet the preliminary examination of an offender against the laws of the United States must be conducted according to the mode of procedure which prevails in the State where such offender is found ; and a like rule is to be observed under a treaty of extradition like the one now under consideration.

The prisoner must be discharged from custody under the final commitment by the commissioner ; but he is properly held under the warrant of arrest, and must be remanded to the custody of the marshal thereunder.

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The proper course will be to proceed with the examination before the commissioner *de novo*.

Ordered accordingly.

NOTE.—See 7 *Blatchf.* 491, where this decision was reviewed by WOODRUFF, Circuit Judge, and approved; particularly upon the point that the petitioner was not, for the error in refusing to permit him to testify, entitled to an absolute discharge, but only to a discharge from the first commitment, leaving the examination to proceed anew.

See, also, other proceedings affecting the same petitioner, 7 *Blatchf.* 84.

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UNITED STATES v. GREATHOUSE.

*Circuit Court, Tenth Circuit; District of California,  
October T., 1863.*

TREASON.—DEFINITION AND PUNISHMENT.—AIDING  
REBELLION.

Although in criminal trials in United States courts, the jury have power to disregard the instructions of the court, and in case of acquittal their decision will be final; yet it is their duty to take the law from the court, and apply it to the facts of the case.

The history of the constitutional definition of treason, and the meaning of its terms, explained.

Rebels, being citizens, are not enemies within the meaning of the Constitution; hence, a conviction for treason, in promoting a rebellion, cannot be sustained under that branch of the constitutional definition which speaks of "adhering to their enemies, giving them aid and comfort."

But aid rendered to a rebellion may sustain a conviction under that clause of the definition which relates to levying war.

To constitute a levying of war, there must be an assemblage of people

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with force and arms, to overthrow the government or resist the laws.

Where war has been levied, all who aid in its prosecution by performing any part in furtherance of the common object, however minute, or however remote from the scene of action, are guilty of treason.

An indictment under section 2 of the act of July 17, 1862, 12 *Stat. at L.* 590, need not use the phrase "levying war," specifically; to follow the language of the act is sufficient. +

The true construction of the act of July 17, 1862, for the punishment of treason, is, that Congress intended, 1. To preserve the act of 1790 (which prescribes the death penalty) in force for the prosecution and punishment of offenses committed previous to July 17, 1862, unless the parties accused are convicted under the act of the latter date, for subsequent offenses; and, 2. To punish treason thereafter committed with either death, or fine and imprisonment, in the discretion of the court, unless the treason consist in engaging in or assisting a rebellion or insurrection; in which event, the death penalty is to be abandoned, and a less penalty is to be inflicted. g

The purchase of a vessel, guns, and ammunition; the preparing her for sea, and making her ready for service in the aid of the rebellion of citizens of the United States against the government thereof, and after war has been levied, with the purpose of attacking and destroying American vessels, are overt acts of treason. +

That such acts done in furtherance of the common design of the insurgents, give "aid and comfort" to the rebellion, is a conclusion of law which follow the acts, whether the vessel actually sails, or whether its cruise be successful or not. / It is not essential to constitute giving aid and comfort, that the effort should be successful, and actually render assistance. Overt acts, which, if successful, would advance the interests of the rebellion, amount to aid and comfort. 7

A letter of marque, issued by a self-styled government, erected by some of the States, or the people thereof, in rebellion against the authority of the United States, constitutes no defense to a judicial trial for treason in acts of levying war, done under such letter, so long as the legislative and executive departments have not recognized the existence of such self-styled government, and its authority to issue letters of marque. +

Trial of an indictment before Judges FIELD and HOFFMAN.

The schooner Chapman was seized by the United States revenue officers, while sailing, or about to sail

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from the port of San Francisco, on a cruise in the service of the then so-called Confederate States, against the commerce of the United States ; and the owner of the vessel and leaders of the expedition were indicted, under the act of Congress of July 17, 1862, for engaging in and giving aid and comfort to the then existing rebellion against the government of the United States.

The indictment alleged, in substance :

1. The existence of a rebellion against the United States, their authority and laws.

2. That the defendants traitorously engaged in and gave aid and comfort to the same.

3. That, in the execution of their treasonable purposes, they procured, fitted out, and armed a vessel to cruise in the service of the rebellion on the high seas, and commit hostilities against the citizens, property, and vessels of the United States ; and that the vessel sailed on such cruise.

A *nolle prosequi* was afterwards entered as to Law, the captain, and Libby, the mate, and they became witnesses for the prosecution.

The evidence disclosed the following facts :

For a long time previous to the expedition upon which the indictment was founded, two of the defendants, Harpending, a Kentuckian, and Rubery, an Englishman, had contemplated the fitting out, from the port of San Francisco, of a Confederate privateer. To this end, several vessels had been examined by them, and they had gone so far as to make a voyage, in a small craft, to Seros island, off the Mexican coast, to see if it would serve as a depot at which to land the passengers of mail steamers, which they hoped to capture. They relied, for the necessary means to carry their intentions into effect, upon the ability of Rubery to realize funds upon drafts made by him on England. In this they had been disappointed. Harpending made the acquaintance of Law, invited him to a room occu-

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pied jointly by himself and Rubery, and there broached to him the subject of the expedition, producing and exhibiting to Law a letter of marque, signed by Jefferson Davis, the head of the pretended government of the rebellion. This document assumed to grant permission to burn, bond, or take into Confederate ports all vessels sailing under the flag of the United States. Accompanying it was a letter of instructions, in which was a form for the bond to be taken. Law entered into the scheme.

Shortly afterwards, a suitable vessel (The Chapman) was found by Harpending, and purchased by another of the defendants, Greathouse, a Kentuckian, who had been a banker, and who, having some means, was brought into the enterprise. Greathouse also purchased the arms and ammunition necessary for the cruise, through the agency of a broker, to whom he pretended that he was acting in the interest of the Liberal party in Mexico. These embraced two brass twelve-pounders, muskets, pistols, knives, shells, fuse, caps, powder, lead, &c. They were placed on board the vessel, in twenty-nine cases, marked "machinery," "oil-mill," &c., in as quiet and expeditious a manner as the circumstances of the case demanded. Some fifteen or twenty uniforms, such as are usually worn by men on vessels of war, were found on board.

Libby was then engaged by Law to go as mate, with a full knowledge of the object of the voyage.

The vessel was put up for the Mexican port of Manzanillo, and some freight was received, but not enough for a full cargo. Greathouse purchased four thousand feet of lumber with which to construct berths, a prison room, and a lower deck.

The plan was to proceed first to the island of Guadalupe, and there land Harpending and the men other than seamen, some fifteen in number. Thence to Manzanillo, for the purpose of delivering the freight.

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Thence back to the island, where they would fit for the voyage, and, mounting their guns, enter upon the service of the rebellion. The course marked out was, that they would first capture a downward bound steamer with treasure from California ; next, the vessel of the wreckers then employed in recovering treasure from the wreck of the steamer *Golden Gate*, on the Mexican coast, near *Manzanillo* ; thence they were to go to the *Chincha Islands* and burn the United States vessels there ; thence to the *China Sea*, and finally, into the *Indian Ocean*.

A dispute arose at one time as to who should have precedence in the expedition. *Law* insisted on being second. *Harpending*, who had yielded the chief command to *Greathouse*, because the latter had furnished all the means, was held to be entitled to the second rank, on the ground that he had traveled on horseback across the continent to the capital of the Confederacy, and procured a letter of marque, and because he had nearly exhausted his means in making the trip. *Law* took the third position.

All but the captain were got on board during the night preceding the intended departure. The men were put in the hold, in an open space in the cargo, directly under the main hatch. The captain had gone ashore early in the evening, with the understanding that he would return during the night. *Rubery* had heard rumors on shore during the evening that a vessel was to be seized, and in view of this supposed danger, proposed sailing without *Law*. This was opposed by *Greathouse*. *Libby* cast off the line at about daylight, hoisted the jib, and headed the schooner out into the stream. "The tide running strong," he partially hoisted the mainsail. Just then two boats pushed off from the United States sloop of war *Cyane*, and headed towards the *Chapman*. *Libby* called *Greathouse's* attention to the boats, and said, "they are after us,"

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whereupon the two "pulled the mainsail up a little further;" but Libby presently remarked, "it is no use; there is no breeze, we cannot get out." The boats soon came up, and the Chapman was boarded by the officers of the government, who took possession of her and of all on board.

The removal of the main hatch exposed to view the entire complement of men. Loaded pistols and new bowie-knives were found hastily stowed away singly in crevices in the freight. Numerous fragments of paper, some torn, some chewed, and some partly burned, were found strewn about the hold, and two of the sailors, who had been forcibly placed in the hold during the night, for safe keeping, testified that some of the party there employed the time intervening between the boarding of the vessel and opening of the hatchway, in destroying papers. In the baggage of Harpending and Rubery were found, among other papers of a similar character, a plan for the capture of Fort Alcatraz, an inflammatory appeal to Southern men in California to rise and aid the Confederate cause, and the form of an oath of fidelity to their cause, in which vengeance was invoked on all who should prove false. It was shown that Harpending had admitted that some of these papers were in his handwriting, and that Rubery had admitted that he and one of the defendants had spent some time in preparing oaths.

During the trial, Moore's *Rebellion Record* was offered in evidence to show the connection with the rebellion of Jefferson Davis, whose name was appended to the letter of marque, with the rebellion. A witness testified to the general reliability of this compilation.

*William H. Sharp*, United States district-attorney, and *Thompson Campbell*, for the government.

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*Delos Lake* and *Alexander Campbell*, for the defendants.

FIELD, J., charged the jury as follows:—*Gentlemen of the Jury*: Before proceeding to give any instructions in this case, it may be proper to briefly call attention to your appropriate and only province in the determination of the issues presented. There prevails a very general, but an erroneous opinion, that in all criminal cases the jury are the judges as well of the law as of the fact—that is, that they have a right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury. They have the power, it is true, to disregard the instructions of the court, and in case of acquittal their decision will be final—for new trials are not granted in criminal cases where a verdict has passed in favor of the defendant; but they have no right, legal or moral, to adopt their own views of the law. It is their duty to take the law from the court and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law, rests solely with the court, and the responsibility of finding correctly the facts, rests solely with the jury. The separation of the functions of the court from those of the jury, in this respect, is essential to the efficacy and safety of jury trials. Any other doctrine would lead only to confusion and uncertainty in the administration of justice. “I hold it,” says Mr. Justice STORY, “the most sacred constitutional right of every party accused of crime, that the jury should respond as to the facts, and the court as to the law. . . . This is the right of every citizen, and it is his only protection.”

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You will, therefore, in this case, gentlemen, take the law from the court, and follow it. If the court err, the responsibility will not be shared by you.

The defendants are indicted for engaging in and giving aid and comfort to the existing rebellion against the government of the United States. The indictment is framed under section 2 of the act of Congress of July 17, 1862, entitled "An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes;" and it charges the commission of acts, which, in the judgment of the court, amount to treason within the meaning of the Constitution. Treason is the only crime defined by the Constitution. That instrument declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." The clause was borrowed from an ancient English statute, enacted in the year 1352, in the reign of Edward the Third, commonly known as the Statute of Treasons. Previous to the passage of that statute, there was great uncertainty as to what constituted treason. Numerous offenses were raised to its grade by arbitrary constructions of the law. The statute was passed to remove this uncertainty, and to restrain the power of the crown to oppress the subject by constructions of this character. It comprehends all treason under seven distinct branches. The framers of our Constitution selected one of these branches, and declared that treason against the United States should be restricted to the acts which it designates. "Treason against the United States," is the language adopted, "shall consist *only* in levying war against them, or adhering to their enemies, giving them aid and comfort." No other acts can be declared to constitute the offense. Congress can neither extend, nor restrict, nor define the crime. Its power over the subject is limited to prescribing the punishment.

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At the time the Constitution was framed, the language incorporated into it from the English statute had received judicial construction, and acquired a definite meaning ; and that meaning has been generally adopted by the courts of the United States. Thus, Chief Justice MARSHALL, in commenting upon the term "levying war," says: "It is a technical term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England and in this country to have been used in the statute of the 25th of Edward III., from which it is borrowed."

The constitutional provision, as you perceive, is divided into two clauses—"levying war against the United States," and "adhering to their enemies, giving them aid and comfort." The term "enemies," as used in the second clause, according to its settled meaning at the time the Constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country. We may, therefore, omit all consideration of this second clause in the constitutional definition of treason. To

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convict the defendants, they must be brought within the first clause of the definition. They must be shown to have committed acts which amount to a levying of war against the United States. To constitute a levying of war, there must be an assemblage of persons in force, to overthrow the government, or to coerce its conduct. The words embrace not only those acts by which war is brought into existence, but also those acts by which war is prosecuted. They levy war who create or carry on war. The offense is complete, whether the force be directed to the entire overthrow of the government throughout the country, or only in certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws.

It is not, however, necessary that I should go into any close definition of the words "levying war," for it is not sought to apply them to any doubtful case. War has been levied against the United States. War of gigantic proportions is now waged against them, and the government is struggling with it for its life. War being levied, all who aid in its prosecution, whether by open hostilities in the field, or by performing any part in the furtherance of the common object, "however minute or however remote from the scene of action," are equally guilty of treason within the constitutional provision. In treason there are no accessories; all who engage in the rebellion, at any stage of its existence, or who designedly give to it any species of aid and comfort, in whatever part of the country they may be, stand on the same footing—they are all principals in the commission of the crime; they are all levying war against the United States.

In *Exp. Bollman*, 4 *Cranch*, 127, Mr. Chief Justice MARSHALL, in delivering the opinion of the supreme court, said: "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the con-

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trary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." And in commenting upon this language on the trial of Burr, the same distinguished judge said : " According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part : that part is the act of levying war. That part, it is true, may be minute ; it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled ; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act of which alone the person who performs it can be convicted." 2 *Burr's Trial*, 438-9.

The indictment in the present case, as I have already stated, is founded upon section 2 of the act of July 17, 1862. The Constitution, although defining treason, leaves to Congress the authority to prescribe its punishment. In 1790, Congress passed an act affixing to the offense the penalty of death. By section 1 of the act of July, 1862, Congress gave a discretionary power to the courts to inflict the penalty of death, or fine and imprisonment, providing that in either case the slaves of the party convicted, if any he have, shall be liberated. Section 2 of the act declares, " that if any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in, or give aid and comfort to any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years,

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or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have, or by both said punishments, at the discretion of the court."

Section 4 provides that the act shall not be construed in any way to affect or alter the prosecution, conviction, or punishment of any person guilty of treason before its passage, unless convicted under the act.

There would seem upon a first examination to be an inconsistency between sections 1 and 2 of this act—section 1 declaring a particular punishment for treason, and section 2 declaring, for acts which may constitute treason, a different punishment. It appears from the debate in the Senate of the United States, when section 2 was under consideration, that it was the opinion of several senators that the commission of the acts which it designates might, under some circumstances, constitute an offense less than treason. The Constitution, as you have seen, declares that "treason against the United States shall consist *only* in levying war, or in adhering to their enemies, giving them aid and comfort." Rebels not being enemies within its meaning, an indictment alleging the giving of aid and comfort to them had been, as was stated, held defective. But if such ruling had been made, it was made, we may presume, not because the giving of aid and comfort to rebels was not treason, but because the parties giving such aid and comfort were equally involved in guilt with those in open hostilities, and should have been indicted for levying war; for every species of aid and comfort, which, if given to a foreign enemy, would constitute treason within the second clause of the constitutional provision—adhering to the enemies of the United States—would, if given to the rebels in insurrection against the government, constitute a levying of war under the first clause. Section 2 of the act, however, relieves the subject from any difficulty, so far as the form of the indictment is concerned. It is not ne-

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cessary now to use specifically the term "levying war;" it will be sufficient if the indictment follows the language of the act, as the indictment does in the present case. But we are unable to conceive of any act designated in section 2 which would not constitute treason, except, perhaps, as suggested by my associate, that of inciting to a rebellion. If we lay aside the discussion in the Senate, and read the several sections of the act together, the apparent inconsistency disappears. Looking at the act alone, we conclude that Congress intended:—1st, to preserve the act of 1790, which prescribes the penalty of death, in force for the prosecution and punishment of offenses committed previous to July 17, 1862, unless the parties accused are convicted under the act of the latter date for subsequent offenses; 2nd, to punish treason thereafter committed with death, or fine and imprisonment, in the discretion of the court, unless the treason consist in engaging in or assisting a rebellion or insurrection against the authority of the United States or the laws thereof, in which event the death penalty is to be abandoned, and a less penalty inflicted. By this construction the apparent inconsistency in the provisions of the different sections is avoided, and effect given to each clause of the act. The defendants are therefore in fact on trial for treason, and they have had all the protection and privileges allowed to parties accused of treason, without being liable, in case of conviction, to the penalty which all other civilized nations have awarded to this, the highest of crimes known to the law.

The indictment charges, that on March 16, 1863, and long before and since, an open and public rebellion by certain citizens of the United States, under a pretended government, called the Confederate States of America, has existed against the United States and their authority and laws; that the defendants, in disregard of their allegiance to the United States, did on that day and

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divers other times before and since, at the city of San Francisco, "maliciously and traitorously" engage in, and give aid and comfort to, the said rebellion ; that in the prosecution and execution of their "treasonable and traitorous" purposes, they procured, prepared, fitted out, and armed a schooner, called the J. M. Chapman, then lying within the port of San Francisco, with intent that the same should be employed in the service of the rebellion to cruise on the high seas, and commit hostilities upon the citizens, property, and vessels of the United States ; and that they entered upon the said schooner and sailed from the port of San Francisco upon such cruise, in the service of said rebellion. In other words, the indictment alleges : 1st, the existence of a rebellion against the United States, their authority and laws ; 2nd, that the defendants traitorously engaged in and gave aid and comfort to the same ; 3rd, that in execution of their treasonable and traitorous purposes, they procured, fitted out, and armed a vessel to cruise in the service of the rebellion upon the high seas, and commit hostilities against the citizens, property, and vessels of the United States ; and, 4th, that they sailed in their vessel from the port of San Francisco, upon such cruise, in the service of the rebellion.

The existence of the rebellion is a matter of public notoriety, and, like matters of general and public concern to the whole country, may be taken notice of by judges and juries without that particular proof which is required of the other matters charged. The public notoriety, the proclamations of the president, and the acts of Congress, are sufficient proof of the allegation of the indictment in this respect. The same notoriety and public documents are also sufficient proof that the rebellion is organized and carried on under a pretended government, called the Confederate States of America.

As to the treasonable purposes of the defendants, there is no conflict in the evidence. It is true, the

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principal witnesses of the government are, according to their own statement, co-conspirators with the defendants and equally involved in guilt with them, if guilt there be in any of them. But their testimony, as you have seen, has been corroborated in many of its essential details. You are, however, the exclusive judges of its credibility. The court will only say to you that there is no rule of law which excludes the testimony of an accomplice, or prevents you from giving credence to it, when it has been corroborated in material particulars. Indeed, gentlemen, the court has not been able to perceive from the argument of counsel that the truth of the material portions of their testimony has been seriously controverted.

It is not necessary that I should state in detail the evidence produced. I do not propose to do so. It is sufficient to refer to its general purport. It is not denied, and it will not be denied, that the evidence tends to establish that Harpending obtained from the president of the so-called Confederate States a letter of marque—a commission to cruise in their service on the high seas, in a private armed vessel, and commit hostilities against the citizens, vessels, and property of the United States ; that his co-defendants and others entered into a conspiracy with him to purchase and fit out and arm a vessel, and cruise under the said letter of marque, in the service of the rebellion ; that in pursuance of the conspiracy they purchased the schooner J. M. Chapman ; that they purchased cannon, shells, and ammunition, and the means usually required in enterprises of that kind, and placed them on board the vessel ; that they employed men for the management of the vessel ; and that, when everything was in readiness, they started with the vessel from the wharf, with the intention to sail from the port of San Francisco on the arrival on board of the captain, who was momentarily expected. Gentlemen, I do not propose to say

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anything to you upon the much disputed questions, whether or not the vessel ever did, in fact, sail from the port of San Francisco, or whether, if she did sail, she started on the hostile expedition. In the judgment of the court they are immaterial, if you find the facts to be what I have said the evidence tends to establish.

When Harpending received the letter of marque, with the intention of using it, if such be the case (and it is stated by one of the witnesses that he represented that he went on horseback over the plains expressly to obtain it), he became leagued with the insurgents—the conspiracy between him and the chiefs of the rebellion was complete ; it was a conspiracy to commit hostilities on the high seas against the United States, their authority and laws. If the other defendants united with him to carry out the hostile expedition, they too, became leagued with him and the insurgent chiefs in Virginia, in the general conspiracy. The subsequent purchasing of the vessel and the guns and the ammunition, and the employment of the men to manage the vessel, if these acts were done in furtherance of the common design, were overt acts of treason. Together, these acts complete the essential charge of the indictment. In doing them, the defendants were performing a part in aid of the great rebellion. They were giving it aid and comfort.

It is not essential, to constitute the giving of aid and comfort, that the enterprise commenced should be successful, and actually render assistance. If, for example, a vessel fully equipped and armed in the service of the rebellion should fail in its attack upon one of our vessels, and be itself captured, no assistance would, in truth, be rendered to the rebellion ; but yet, in judgment of law—in legal intent—the aid and comfort would be given. So if a letter containing important intelligence for the insurgents, be forwarded, the aid and comfort are given, though the letter be intercepted on

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its way. Thus, FOSTER, in his *Treatise on Crown Law*, says: "And the bare sending money or provisions, or sending intelligence to rebels or enemies, which in most cases is the most effectual aid that can be given them, will make a man a traitor, though the money or intelligence should happen to be intercepted ; for the party in sending it did all he could ; the treason was complete on his part, though it had not the effect he intended."

Wherever overt acts have been committed which, in their natural consequence, if successful, would encourage and advance the interests of the rebellion, in judgment of law, aid and comfort are given. Whether aid and comfort are given—the overt acts of treason being established—is not left to the balancing of probabilities ; it is a conclusion of law.

If the defendants obtained a letter of marque from the president of the so-called Confederate States, the fact does not exempt them from prosecution in the tribunals of the country for the acts charged in the indictment. The existence of civil war, and the application of the rules of war to particular cases, under special circumstances, do not imply the renunciation or waiver by the Federal government of any of its rights as sovereign towards the citizens of the seceded States.

As matter of policy and humanity, the government of the United States has treated the citizens of the so-called Confederate States taken in open hostilities as prisoners of war, and has thus exempted them from trial for violation of its municipal laws. But the courts have no such dispensing power ; they can only enforce the laws as they find them upon the statute-book. They cannot treat any new government as having authority to issue commissions or letters of marque which will afford protection to its citizens, until the legislative and executive departments have recognized its existence. The judiciary follows the political department

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of the government in these particulars. By that department, the rules of war have been applied only in special cases ; and notwithstanding the application, Congress has legislated, in numerous instances, for the punishment of all parties engaged in, or rendering assistance in any way to the existing rebellion. The law under which the defendants are indicted, was passed after captives in war had been treated and exchanged as prisoners of war, in numerous instances.

But even if full belligerent rights had been conceded to the Confederate States, such rights could not be invoked for the protection of persons entering within the limits of States which have never seceded, and secretly getting up hostile expeditions against our government and its authority and laws. The local and temporary allegiance, which every one—citizen or alien—owes to the government under which he at the time lives, is sufficient to subject him to the penalties of treason.

These, gentlemen, constitute all the instructions I have to give. My associate, Judge HOFFMAN, will submit some further observations to you. The case is one of much interest—not because it is the only case for treason tried in the State, but because of the great importance of the principles involved. As you will weigh carefully the evidence, and be guided by the instructions of the court, you will have no difficulty in reaching an intelligent and just verdict.

HOFFMAN, J., then gave additional instructions to the jury, substantially consistent with those above stated.

The jury found a verdict of :

GUILTY.

NOTE.—Sentence imposing both fine and imprisonment was in due form pronounced upon the prisoners by Mr. Justice FIELD.

Rubery, the Englishman, was subsequently pardoned by President Lincoln, at the request of "our good friend," John Bright, of England.

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The other prisoners were subsequently, during the attendance of Justice FIELD upon the supreme court at Washington, brought before District Judge HOFFMAN, upon *habeas corpus* ; and were released from custody, upon taking the oath prescribed in a general amnesty proclamation, issued by the president, after their sentence, and upon giving bonds for future good behavior. See the following case.

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GREATHOUSE'S CASE.

*Circuit Court, Tenth Circuit ; Northern District of California, 1864.*

## CRIMINAL JURISDICTION.—PARDONS.

The authority given to judges of the United States courts, by section 14 of the act of September 24, 1789, 1 *Stat. at L.* 81, to grant writs of *habeas corpus*, extends to cases where a prisoner is in custody under a valid conviction and sentence, but claims release upon the ground of a pardon.

The amnesty proclamation of the president, of December 8, 1863,—offering pardon to those persons who had participated in the then existing rebellion, upon the condition of their subscribing to an oath to support the United States Constitution, &c.,—extends to persons who, prior to the date of the proclamation, had been convicted and sentenced for the offenses described in such proclamation.

That proclamation included within its benefits, not only those who joined the rebellion in arms, but also those who were in any way implicated therein.

In the case of a general pardon by proclamation or act of the legislature, of which the court takes judicial notice, the court must dismiss all knowledge of the intentions of the pardoning power, except such as is to be derived from the terms of the act of grace itself.

Where a pardon is granted, with a condition annexed, the fact that the person pardoned is in prison, and must accept the condition before receiving the benefit of the pardon, does not constitute such duress as will make his acceptance of the condition of no effect.

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Greathouse's Case.

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Application for a writ of *habeas corpus*.

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The trial and conviction of Ridgley Greathouse, for treasonable acts, is reported *ante*, p. 364. Application was now made, on his behalf, for a writ of *habeas corpus*, to procure his discharge.

HOFFMAN, J.—A writ of *habeas corpus* is applied for on the part of Ridgley Greathouse, a prisoner now in execution under the judgment and sentence of this court, for the crime of engaging in and giving aid and comfort to the existing rebellion. The legality of the conviction and sentence is not denied ; but it is claimed that the prisoner is entitled to his discharge under the proclamation of the president, of December 8, 1863.

The application is resisted by the district-attorney on two grounds :

1st. That the court has no jurisdiction to award the writ or discharge the prisoner, even though it be clear that he is within the terms of the proclamation ; and,

2nd. That the proclamation does not apply to his and similar cases.

1. As to the jurisdiction of the court.

The authority of the courts of the United States, and of the judges thereof, to issue writs of *habeas corpus*, is derived from section 14 of the act of September 24, 1789.

That section provides that “ either of the justices of the supreme court, as well as the judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. Provided, that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or committed for trial before some

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court of the same, or necessary to be brought into court to testify."

It is contended by the district-attorney that the authority here given does not embrace cases where a prisoner is in custody under conviction and sentence. That the court, when sentence is pronounced, is *functus officio*, and has no further power over the case; that the marshal's return that he holds the prisoner by virtue of such conviction and sentence is conclusive; and that even a special pardon issued to the prisoner cannot be set up in answer to it.

For this position no authority is cited. It will be seen, that if correct, it would be the duty of the court to remand the prisoner to undergo execution of a capital sentence, even though he should produce a full and free pardon by the president, under the great seal of State. Even this result the district-attorney did not hesitate to admit to be the necessary consequence of the principle contended for.

The terms of the statute embrace, it will be observed, all cases of commitment—and the proviso by implication includes not only cases of commitment for trial before some court of the United States, but also all cases where persons are in jail *under or by color of the authority of the United States*. It is evident that this language extends to all persons imprisoned under the authority of the United States, whether under the judgment of a court or the warrant of a committing magistrate.

The duty of the court, on the return of the writ, is plain. If it appear that the prisoner is held by virtue of a warrant issued by a competent officer, or by the judgment and sentence of a court of competent jurisdiction, he will be remanded. But if it appear that though the original commitment was lawful, yet, that in consequence of some subsequent event, his further detention is no longer lawful, he will be discharged.

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Thus, if he be committed until he pay a fine, which he has paid accordingly, and the return states the commitment only, the court will inquire into the fact and release the prisoner. "So, after a conviction, he may allege a pardon, or that the judgment under which he was imprisoned has been reversed." 1 *Hill*, 404. In *People v. Cassels*, 5 *Id.* 167, Judge BRONSON says: "The officers may also inquire whether any cause has arisen since the commitment, for putting an end to the imprisonment, as a pardon, reversal of the judgment, payment of the fine, and the like."

That the court does not become, by passing sentence, *functus officio*, to all intents and purposes, is evident from the consideration that it is by virtue of the authority of the court and by force of its sentence that the prisoner is detained ; and even when he has obtained a conditional pardon and been discharged, yet, if he violate the condition, he may be re-arrested and remanded by the court in execution of the original sentence.

But the point is authoritatively settled by the supreme court of the United States.

In *Exp. Wells*, a motion was made in the circuit court for a *habeas corpus* on behalf of Wells, a prisoner convicted of murder and sentenced to death, but who had been pardoned by the president upon condition that he be imprisoned during his natural life. Under this pardon the prisoner claimed to be entitled to his discharge. The application was refused by the circuit court, and came before the supreme court by way of appeal. The questions debated were, whether the supreme court was not, in entertaining the application, exercising an original instead of the appellate jurisdiction to which, in such cases, the Constitution restricts it ; and, secondly, as to the force and effect of the pardon and the legality of an imprisonment by virtue of the condition contained in it, and the prisoner's accept-

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ance of it. It was held that the jurisdiction invoked was an appellate jurisdiction ; and that the imprisonment pursuant to the condition of the pardon was legal. But no doubt seems to have been suggested—either by the court or at the bar—of the authority of the circuit court to award the writ ; nor of that of the supreme court, provided the jurisdiction exercised was appellate, and not original. In *Exp. Watkins*, 7 *Pet.* 568, the court awarded the writ in the case of a person convicted of offenses against the United States, and sentenced to imprisonment and the payment of fines. It is nowhere suggested in the case, that the authority of the circuit court, or that of the supreme court (if the jurisdiction was to be deemed appellate), to inquire into the force and effect of the sentence, and the legality of a further imprisonment under it, was open to controversy. It is plain, from the foregoing, that it is the right and duty of the court in this case to inquire into the cause of commitment of the prisoner, and that if he is held by virtue of the sentence of this court, to ascertain and decide whether, by reason of any matter subsequent thereto, such as the payment of his fine, the expiration of his term of imprisonment, a pardon, or the like, he is now entitled to be discharged.

2. The pardon whereby it is claimed that the sentence of the prisoner is avoided is contained in the proclamation of the president, of December 8, 1863. The part requisite to consider is as follows :

“Therefore, I, Abraham Lincoln, President of the United States, do proclaim, declare, and make known to all persons who have directly or by implication participated in the existing rebellion, except as hereinafter excepted, that a full pardon is granted to them and each of them, with restoration of all rights, except where rights of third parties shall have intervened, and upon the condition that every such person shall take and subscribe an oath, and thenceforward keep and maintain

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said oath, and which oath shall be registered for permanent preservation, and shall be of the tenor and effect following, to wit:" &c.

The authority of the president to grant an effectual pardon to all persons embraced within the terms of this proclamation is not disputed. It is derived from the power confided to him by the Constitution, and in this case is exercised in pursuance, as the preamble recites, of an express authority given by Congress to the president, "to extend by proclamation to all persons who may have participated in the existing rebellion in any State or part thereof, pardon and amnesty, with such exceptions, and at such terms, and on such conditions, as he may deem expedient for the public welfare."

The pardon and amnesty thus proclaimed is therefore a public and official act, of which the court will take judicial notice, and it corresponds to a class of pardons well known in England—pardons by act of Parliament.

Nor is it disputed that the crime described in the proclamation is the same crime as that whereof the prisoner has been convicted. The language of the proclamation is, "All persons who have directly, or by implication, participated in the existing rebellion."

The offense of the prisoner, as charged in the indictment, is, "That he engaged in the existing rebellion, and gave to it aid and comfort." The offense pardoned is, therefore, evidently the offense committed by the prisoner.

But it is urged by the district-attorney that this proclamation does not extend to persons who, at its date, had been convicted and sentenced for the offenses described in it. In support of this position, he cites various ancient English authorities.

It is not disputed that, by the common law, if a man be attainted of felony, and get a pardon which doth not mention the attainder, the pardon will be inef-

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fectual. So, also, it has been held that the pardon of a person convicted by verdict of felony, is void unless it recite the indictment and verdict. It has even been questioned if the pardon of a person barely indicted of felony, be good without mentioning the indictment. *Bacon's Abr., Pardon, D.*, and cases cited.

These and similar decisions are founded on the general principle that whenever it appears, by the recital of the pardon, that the king was misinformed, or not rightly apprised, both of the heinousness of the crime, and also how far the party stands convicted upon record, the pardon is void, upon the presumption that it was gained from the king by imposition. Any suppression of truth or suggestion of falsehood in a charter of pardon, was therefore held to vitiate it.

But it may be doubted whether, at the present day, such rules would be enforced in this country, or even in England. We learn from BARRINGTON (*Obs. on Statutes*, 27, 231) that at the time of Magna Charta, and for many years subsequently, the abuse of the pardoning power by the king, and the impositions practiced upon him, were the subject of frequent and clamorous complaint. The ancient punishment for murder was a *were gild*, paid as a satisfaction to the nearest relative of the deceased. It was, therefore, a most crying abuse of power in the king not only to pardon this most heinous crime, but in consideration also of the mulct, which otherwise should have been given to the relation who prosecuted.

Hence, we find it enacted by statute of 27 Edward III., that in every pardon of felony granted at any man's suggestion, the suggestion, and the name of him that makes it, shall be compared, and if it be found untrue the charter shall be disallowed, and the justices before whom the charges shall be alleged shall inquire of the same suggestion, and if they find it untrue, shall disallow the charter. So, by statute 13 Richard II., it

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was enacted that no pardon for murder or rape shall be allowed, unless the offense be particularly specified therein, and especially in murder it shall be expressed whether it was committed by lying in wait, assault, or *malice prepense*. 18 *Steph. Com.* 468.

In analogy to these statutory requirements, and to carry out the same policy, the courts held a pardon to be void whenever it might reasonably be presumed that the king was deceived ; and they considered the omission to recite the fact that the person pardoned had been attainted or convicted, or perhaps even indicted, as evidence that an imposition had been practiced on the king. How far these rules would now be enforced in this country is not very clear.

In the Matter of Eddymoin, 8 *How. Pr.* 478, a pardon was held on *habeas corpus* to be valid, although it appeared that a gross fraud had been perpetrated on the executive ; that no notice of the application for pardon had been given to the district-attorney as required by law ; that the signatures of the officers of the prison to the application for pardon had been forged, as also a letter accompanying the petition purporting to be from the physician of the prison ; and that on these papers the pardon was granted.

In *United States v. Stettin* (United States Circuit Court, Philadelphia), it was held by Judge KANE, that where the pardon recited a conviction "at the June term" of the district court, of counterfeiting the silver coin of the United States, and a sentence of imprisonment for one year, and the record showed a conviction at the "May sessions" of two felonies, one counterfeiting and forging ten pieces of coin, and the other uttering and passing them, on which there was a sentence of fine as well as imprisonment—the pardon was ineffectual to restore the competency of the party as witness. *Whart. Cr. Law*, § 766, *in notis*.

Whether a similar inaccuracy as to the term at which

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the conviction was had, and the description of the offense as stated in the indictment, would, in a capital case, and in the face of the plain intention of the executive to pardon, be held to vitiate it, and the prisoner remanded for execution, may be doubted.

The case cited from the *New York Reports* is clearly an authority that the fact that the executive was grossly deceived will not avoid the pardon ; and if this be law, it follows that the omission to recite the fact of a conviction and judgment, which is in England adjudged to avoid the pardon only because it affords evidence that the king was deceived, would not have the like effect in this country. Independently of the presumption of deception, arising from a failure to recite a previous conviction or indictment, the absence of such recitals would seem to afford no ground for avoiding the pardon.

All pardons, except in cases of illegal convictions, &c., proceed upon the hypothesis of the legal guilt of the person pardoned. If he be not guilty, it is presumed that he will be acquitted, and he has no need of a pardon. The pardon is granted on considerations which satisfy the executive that, in the particular case, an offender, though guilty, should be pardoned.

It would seem, therefore, to be of slight importance whether the guilt of the offender be judicially ascertained or not, provided the executive is fully apprised of the nature of the offense pardoned. For the pardon goes upon the presumption that the offender, if not already convicted, will be ; else he would not need to plead his pardon to the indictment, but would be saved under his plea of not guilty.

It is believed, however, that in the United States few pardons have ever been granted until after conviction.

But whatever be the rules with respect to private pardons by charter from the king, or special pardons by the executive in this country, it is very clear that

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they have no application, even in England, to general pardons by act of Parliament.

This is evident on grounds of reason, as well as on authority. The only reason assigned for holding void the pardon of a convict, the which does not recite the conviction or indicting of a person indicted, is, that it appears from the omission that the king was not acquainted with the facts of the case. But this reason can have no application to general acts of amnesty and pardon, which are intended to include whole classes of offenders, and are in no respect founded on any consideration of the circumstances of particular cases, except of those which by name or special description may be excepted out of them.

They are, like the amnesty bills passed on the accession of Henry VII., at the restoration of Charles II., and by William III., at the révolution of 1688, or in this country after the whisky rebellion, public and general acts, dictated by motives of policy and considerations of State, as well as of clemency ; but not founded, except as before stated as to those excluded from their benefits, on any particular examination of the circumstances of individual cases. As to those included within their terms, there can be no reason to allege that the king was misinformed or deceived.

Neither can it, when an act of State or of so great importance is contemplated, be presumed to be intended that the accidental difference in the situation of offenders—some of whom, perhaps the most guilty, may not have been arrested, or if arrested, not indicted or convicted ; while others, perhaps less guilty, have been tried and convicted—should enable the former to avail themselves of the offer of grace, while the latter would be excluded. A moment's consideration of the operation of such a rule of discrimination between offenders at large and offenders in custody, will convince us of its unreasonableness.

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The diligence of the district-attorney has failed to discover a single case where the benefit of a general pardon, by act of Parliament or by royal proclamation of amnesty, has been withheld on the ground that the party had already been convicted.

Baron COMYN says (*Dig.* § 53): "Also, it hath been adjudged that where an act of Parliament expressly pardons such and such crimes from a certain day before the session, it thereby avoids all convictions and deprivations, and awards of costs and amercia-ments for such crimes, whether such convictions were before or after the sessions, because it appears to be the intent of the Parliament that such crimes shall in no way be punished which cannot take effect, if such convictions, &c., remain in force." And for this he cites numerous authorities.

It was even adjudged, when a parson had been deprived for adultery, and by subsequent act of Parliament the offenses of adultery, *inter alia*, were pardoned, the sentence was thereby made void, and the parson reinstated in his living, notwithstanding that in the meantime, and while the deprivation stood in force, another had been admitted, instituted, and inducted. 3 *Coke*, 6, 14. So if one be attainted of felony, and afterward, by relation of a general pardon, the felony is pardoned, he shall be discharged, for he has not the remedy by error or otherwise to reverse the attainder. *Plowd.* 401. It even seems that the ancient fiction by which acts of Parliament were deemed to relate to the first day of the session, has been allowed to give a retrospective effect to an act of pardon enacted during the session, and to make utterly void sentences passed before the passage of said act.

On these authorities, and for the reasons assigned above, it appears to me indisputable that where by act of Parliament or by royal proclamation of amnesty, certain kinds of offenses or classes of offenders are par-

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doned, all offenders embraced within the description, and all persons included within the classes designated are, unless specially excepted, entitled to the benefit of the pardon.

If there be any case where the benefit of such a pardon or amnesty has been refused to a person otherwise within it, on the the ground that his guilt had already been judicially ascertained, I have failed to discover it.

It is suggested by the district-attorney that the proclamation was intended to apply only to rebels in arms, or in a situation to injure the government, and not to such as are already arrested and incarcerated.

But the language of the proclamation expresses no such limitation. A full pardon is granted "to all persons who have directly, or by *implication, participated* in the existing rebellion."

It, therefore, includes not only those who have joined the rebellion in arms, but those who have in any way been implicated in it. I know of no rule of construction which would authorize a court to interpolate into the language of a statute or public act a qualification such as is suggested by the district-attorney.

It may be observed, in addition, that the interpretation contended for would degrade what was evidently intended as an act of mercy and conciliation, into a mere bargain, by which the president barter away impunity for crime, in consideration of an exemption from future attacks upon the government; and that it makes his clemency merely commensurate with his apprehensions. The active and dangerous rebel is to be pardoned if he will renounce his treasonable designs; but the terrors of the law are unmitigated for the impotent and harmless rebel, who is not formidable enough to be entitled to forgiveness.

Such a construction of the proclamation seems to me

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too repugnant to reason and sound policy to be for a moment admitted.

It was also urged by the district-attorney, that the president has himself given a practical construction to his proclamation, by issuing to Albert Rubery, a co-defendant with the petitioner, a special pardon, thereby showing that he did not consider him within the purview of the proclamation.

It has even been suggested that there are good, though private, grounds for the belief that the case of the Chapman prisoners was not intended by the president to be covered by the proclamation. But it is to be observed that the pardon of Rubery was granted as a mark of respect and good will to Mr. Bright, by whom it had been solicited, and on condition that Rubery should leave the country within thirty days. As Rubery was a British subject, the oath, the taking of which is the condition imposed by the proclamation, could not have reasonably been exacted of him, and he might thus, if unwilling to take it, have been deprived of the general pardon.

Whether or not the failure to except the case of the Chapman prisoners from the operation of the general terms of the proclamation arose from accident or inadvertence, the court cannot judicially know. Its plain duty is to construe the proclamation like any other public act or law, and to apply to it the well-settled rules of interpretation, irrespective of any opinion, or even knowledge, of the private but unexpressed intention of its author. Such is the rule, even with respect to a private pardon of an individual offender. "A pardon," says Mr. Ch. J. MARSHALL, "is an act of grace proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed. It is the private, though official act, of the executive magistrate delivered to the

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individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system that the judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially. A private deed not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown and cannot be acted on. The looseness which would be introduced into judicial proceedings would prove fatal to the great principles of justice, if the judge might notice and act upon facts not brought regularly into the cause. Such a proceeding in ordinary cases would subvert the best established principles, and overturn those rules which have been settled by the wisdom of ages."

"Is there anything peculiar in a pardon which ought to distinguish it in this respect from other facts?

"We know of no legal principles which will sustain such a distinction."

"The pardon may possibly apply to a different person or a different crime. It may be absolute or conditional. It may be controverted by the prosecutor, and must be expounded by the court. These circumstances combine to show that this, like any other deed, ought to be brought judicially before the court by plea, motion, or otherwise." *United States v. Wilson*, 7 *Pet.* 161.

In the case in which these observations were made, the prisoner had declined to avail himself of a pardon which he had received. It was held that the court could not judicially notice the pardon unless produced and brought before it. But if the court, though aware that a pardon has been granted, cannot know of its existence until it is judicially brought before it, how can it, when the pardon is produced, be governed in its construction or the expounding of its effect by any extrinsic fact of which judicially it is ignorant? And

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especially in the case of a general pardon by proclamation or act of legislature, of which the court takes judicial notice, must it dismiss all knowledge of the intentions of the pardoning power except such as is to be derived from the terms of the act of grace itself.

Finally, it is urged by the district-attorney that the proclamation, or pardon contained therein, is of the nature of a contract, by which the president remits the punishment for the offense, in consideration of the oath to be taken by the offender that he will support the Constitution. That the petitioner, being in prison and under duress, could not take such an oath, nor was he in a position to render the consideration exacted by the proclamation before its provisions can be availed of. This view of the proclamation has already been considered. It is not a contract between equals, each receiving an equivalent for what he surrenders. It is an act of clemency, grace, and conciliation. Its condition was intended, not as a consideration, but merely to exclude from its benefits the obdurate, and those who are not willing to renounce the future commission of the same offenses. The duty of supporting the Constitution is of paramount obligation on every American citizen. The promise or the oath to perform this duty is no more a good or a valuable consideration for the remission of penalties incurred by its previous violation, than repentance and a resolution to amend are considerations for the forgiveness of all sins promised on those conditions by the Divine Goodness.

That a conditional pardon accepted by a convict is deemed to be accepted voluntarily, and not under duress *per minas*, or by imprisonment, has been expressly adjudged by the supreme court. "As to the suggestion that conditional pardons cannot be considered as being voluntarily accepted by convicts so as to be binding on them, because they are made while under duress *per minas* and duress of imprisonment,

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it is only necessary to remark that neither applies to this case, as the petitioner was legally in prison. *Exp. Wells*, 18 *How.* 315.

If the petitioner in the case at bar had been sentenced to death, and had accepted a pardon which commuted his punishment to imprisonment for life, his acceptance would, under this decision, have been deemed voluntary, and his imprisonment for life legal. Can it be contended that when the condition is that he shall take an oath which binds him to discharge his duties as a citizen, and to refrain from the further committing of treason, his acceptance of the pardon is not voluntary and legal?

How far the promise of the petitioner, or any other person who may accept the conditions of the proclamation, is sincere, and expresses a real determination to fulfill it, we cannot know. The president has seen fit to invite all persons guilty of treason (with certain exceptions) solemnly to assume anew their obligations as citizens, and, as an inducement, he has offered them pardon for past offenses.

It appears to me plain that all persons not included in the excepted classes are to be deemed to be pardoned, on their complying with the required condition.

I have thus noticed, I believe, every objection or suggestion urged by the district-attorney, to show that the petitioner is not within the operation of the proclamation. My conclusion is, that the punishment to which he was sentenced has been remitted by the executive, and his offense pardoned. He is, consequently, entitled to the writ prayed for, on the return of which, if nothing further appears, he must be discharged.

I reach this conclusion not without reluctance. The crime of the prisoner has been grave, for it involved not only the violation of the duty he owed as an American citizen to this country, but the breach of the allegiance

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he owed to this State, of which he has long been a resident and citizen, as well as an intended outrage upon his neighbors and fellow-citizens, whose property he proposed to plunder. I am, perhaps, justified in assuming that if the special circumstances of this case had been brought to the attention of the president, or had been in his mind when he was framing his proclamation, the petitioner and his associates would probably have been excepted from its operation.

But my duty is to administer the law, and to construe this proclamation like a public statute, according to its terms and legal import. I am not at liberty to withhold its benefits from any persons embraced by its terms, whether they have been so embraced by inadvertence or design.

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### JORDAN v. DOBSON.

*Circuit Court, Third Circuit; Eastern District of Pennsylvania, September T., 1870.*

#### PATENTS.—PARTIES.—EXTENSIONS.—POWERS OF CONGRESS.

It is a fatal defect in a bill to enjoin the infringement of a patent for an invention, that all the owners of the patent have not been made parties.

But those persons only are deemed owners, within the rule, to whom the patent was issued, or to whom interests in it have been transferred by assignment in writing, duly authenticated.

In a suit founded upon a re-issued patent, the courts must presume

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that the commissioner duly performed his duty of ascertaining that the defect in the original specification was owing to inadvertence, accident, or mistake; and that the amended description is of the same invention as was covered by the original patent.

*It seems*, that this presumption is conclusive, except against the allegation of fraud in the transaction.

When fraud is alleged, the burden of proving it is upon the party making the charge.

Congress has power to authorize, by special act, the extension of a patent, notwithstanding the fact that the original patent has previously expired, and the invention has been introduced to public use.

A special act of Congress, authorizing an extension of a particular patent, should be read and construed in connection with the general acts on the subject of patents.

The decision of the commissioner of patents in granting an extension, is conclusive evidence of all the facts which he is required to find before issuing it,—*a. g.*, of the fact that there has not been an abandonment of the invention.

The issue, re-issue, and extension of a patent, and the fact that it has been sustained in previous suits, create a strong presumption against a defense of want of novelty in the invention.

The requisites of an answer seeking to set up want of novelty in the invention, in defense to a bill for an infringement of a patent, and the sufficiency of the evidence to sustain such defense,—considered.

The validity of the extended patent, granted August 20, 1862, under special act of May 30, 1862, for improvements in manufacture of fibrous materials,—examined and sustained.

A license granted by the patentee of an invention, permitting the invention to be manufactured and used upon certain terms and conditions, cannot be deemed evidence of an acquiescence in infringements of his right. It implies the assertion of an exclusive right in the invention.

When a patent expires during the pendency of a suit for infringement, no perpetual injunction can be granted, but complainant may obtain a decree for an accounting.

Hearing upon pleadings and proofs, in equity.

*H. T. Fenton* and *F. Shepard*, for the complainants.

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*Nathan Sharpless, C. Guillon, George H. Earle, R. P. White, and George Junkin, for the defendants.*

STRONG, J.—In the year 1863, the complainant, by sundry assignments, became the owner of a patent for a new and useful improvement in machinery for the manufacture of wool and other fibrous material, originally granted to John Goulding. The patent was first issued on December 15, 1826, and it granted to the patentee the full and exclusive right and liberty to make, construct, and use, and vend to others to be used, the invention therein described, for the period of fourteen years from its date. It was surrendered on July 29, 1836, and letters patent for the same invention were then re-issued for the residue of the term for which the patent was at first granted. For some reason, which does not clearly appear in the evidence, but which the bill alleges to have been accident and mistake, the patentee failed to obtain an extension of the patent before the expiration of the time for which it was originally issued. But on May 30, 1862, an act of Congress was passed by which the commissioner of patents, on application to him made by the patentee, was authorized to grant a renewal and extension of the patent for seven years from the time of such renewal and extension, or withhold the same under the existing laws, in the same manner as if the application therefor had been seasonably made, with a proviso, however, that such renewal and extension should not have the effect, or be construed to restrain persons who might be using the machinery invented by said patentee at the time of the renewal, from continuing to use the same ; nor to subject them to any claim for damage for having so used it. Under this act of Congress the patent which had been granted to Goulding, and which had expired, was renewed, and extended by the commissioner of patents for seven years from the date of its renewal, viz : Aug-

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ust 20, 1862. It was in the year next following that the complainant succeeded to its ownership. On June 28, 1864, this extended patent was surrendered, and re-issued to the complainant for the remainder of the seven years. Such is the right asserted by the complainant in the bill now before me, and it is established by the evidence.

The bill further complains, that since the date and issuing of the last above mentioned re-issued letters patent, and while the exclusive right was in the complainant, the defendants have, without his license, and in disregard of his right, manufactured, used, and sold, and that they continue to manufacture, use, and sell, in large numbers, cards and jacks and machinery which were made after August 30, 1862, embracing and containing the improvement invented by said Goulding, and secured to the complainant by the last above mentioned re-issued letters patent; or embracing and containing mechanism substantially the same in principle, construction, and mode of operation, as the said improvement.

All that need be said of this allegation of infringement, is, that, in part, it is incontrovertibly proved. It is true, the defendants have not manufactured or sold the cards, jacks, and machinery described in the patent, but the evidence is full that they have used the patented improvement; that they bought numerous sets of the machinery after the patent was extended, and used them until this bill was filed. Indeed, I do not understand the fact of infringement as being seriously contested. It was not directly denied in the answer, nor was it in the argument. The defense is rested upon other grounds, which I shall proceed to consider.

It is first alleged that all the owners of the patent have not been made parties to the bill. If this averment is well founded, of course there is a fatal defect. But I do not think it is sustained by the evidence. So

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far as the written evidence extends, it shows beyond doubt that the entire ownership of the patent to Goulding was vested in the complainant in 1863, and that in 1864, the re-issued letters were granted to the complainant alone. No grant, or assignment from him to any other person, has been shown. The act of Congress authorizes assignments only in writing, and legal ownership can be acquired only by written instruments. No successful attempt has been made to prove that the complainant has ever made any written assignment or grant of any part of the title to the patent. It is true, one of the witnesses testified that the parties interested in the patent are Jordan, Marsh, & Co., consisting of Eben D. Jordan, B. L. Marsh, Charles Marsh, and James Fisk, Jr., and the firm of Frances Skinner & Co., and the firm of Brooks & Ball, and that all these parties hold an interest as owners, and are part owners. Had the witness said nothing more, his testimony would have been insufficient to establish legal ownership in the persons named. That, as already said, can only be created by written instruments of transfer, and the witness knew of none. But he has explained and corrected his testimony, saying that, upon reflection, he found he was mistaken in his statement that other parties than Eben D. Jordan (the complainant) were interested, as owners, in the patent; that he knew of no other than the said Jordan who is interested as an owner; that he had never seen or known of the existence of any writing or instrument which conveys any part of the patent to the parties above named, and that he had never heard any of the said parties claim to be part owners with Eben D. Jordan. He has stated further, that when he testified others than Jordan were joint owners of the patent, he confounded those who, under an arrangement of which he had been informed, were to receive a portion of the net proceeds of the collections under the patent, with owners. I need not say

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an interest in the net proceeds of collections under a patent does not necessarily amount to legal ownership of the patent itself. It is plain, therefore, as the case appears, that there has been no want of joinder of the necessary parties.

The other matters of defense set up relate mainly to the patent itself, and the defendants have attempted to show its invalidity for many reasons. It is contended that when the surrender of the original patent was made in 1836, and the new patent issued, the surrender was not made, as alleged, because the original was inoperative and invalid by reason of a defective specification (the error having arisen by accident and mistake), without any fraudulent or deceptive intention, but that the surrender was made and the re-issued letters were obtained with a fraudulent and deceptive intention of including important changes, not a part of the invention of the patentee.

The same allegation is made respecting the surrender of the extended patent, and its re-issue in 1864; and it is argued, that by reason of such fraudulent and deceptive intention, the re-issued patents were void. Section 13 of the act of July 4, 1836, enacted that when any patent which had been granted, or which should thereafter be granted, should be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification, as his own invention, more than he had or should have a right to claim as new, he may surrender the patent and obtain a new one for the same invention, for the residue of the period then unexpired, for which the original patent was granted, in accordance with the patentee's corrected description and specification, if the error had arisen, or should arise from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention. Under this act, it is the duty of the commissioner of patents, when an applica-

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tion is made to him for a re-issue, to inquire and determine whether the defect or insufficiency of the original specification was owing to inadvertence, accident, or mistake, or originated in a fraudulent intention; and also to inquire and determine whether the amended description is of the same invention. It must be assumed that he performed his duty, when the first re-issue was made in 1836, and the second in 1864. There is always a presumption that a public officer acts rightly. If the defect or insufficiency of the specifications of the surrendered patents had not arisen from inadvertence, accident, or mistake, and without fraudulent intention, the commissioner had no right to re-issue the patent; nor had he any right to re-issue it, if the invention described in the amended specification was not the same as that originally patented, or intended to be patented. It must be assumed, therefore, that he did determine there were defects in the former specifications, arising from inadvertence, accident, or mistake, without any fraudulent intention. And having thus determined, his decisions are conclusive. They are not re-examinable, except, perhaps, so far as he decided there was no fraud. It is now settled that the granting of a renewed patent is so far conclusive upon the question of the existence of error in the original patent, arising from inadvertence, accident, or mistake, that it leaves nothing open but the fairness of the transaction. *Stimpson v. West Chester R. R. Co.*, 4 *How.* 380; *Woodward v. Stone*, 3 *Story C. Ct.* 749; *Allen v. Blunt*, *Id.*, 742; *Curt. on Patents*, 280. It must also, I think, raise a presumption against the existence of any fraudulent intent. But if not, a party who alleges fraud must prove it, and there certainly is no evidence in this cause of any such fraud, either in the original patentee or in the complainant. It is not asserted that there is any, if the re-issued patents were for the same invention as that attempted to be described in the patent first granted.

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That they were for the same I have no doubt. I have said that it is the commissioner's duty, when a patent is offered for surrender, and application is made for re-issue, to inquire and determine whether the amended description and specification cover the same invention as that which was sought to be covered by the surrendered patent. That they are for the same invention is a fact that he must find before he can re-issue the patent. The fact of re-issue then must raise a presumption that the invention is the same. It may even be doubted whether this is not a conclusive presumption, unless (to use the language of Judge STORY, in *Allen v. Blunt*) "it is apparent on the very face of the patent itself, without any auxiliary evidence, that the commissioner was guilty of a clear excess of authority, or that the patent was procured by a fraud between him and the patentee."

But conceding that the decision of the commissioner is not final, what there is in this case that would justify my holding, against the presumption mentioned, the invention described and patented in the re-issued letters of 1864 to be a different one from that attempted to be described in the original patent of 1826, and the reissue of 1836, I cannot discover. There are some slight, very slight, changes in the specification, and there are changes in the form of the claim. But the surrender of a patent for re-issue contemplates a change or an amendment of the former specification, or claim. It is allowed for that purpose and in order to make that operative which was inoperative before. It appears to me that the specification of the original patent described a combination of machines and mechanical devices to effect a specified result. Some of the devices combined were themselves combinations invented by the patentee. The elements of these subordinate combinations were old, and were not claimed as new, but the combinations themselves were described. Gould-

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ing's invention, as described by him, was, therefore, not only of the entire combination of all the machines and devices used, but of some of the elements of that combination. This is evident to me from the description given. All the combinations mentioned in the re-issue of 1864 are described and represented in the drawings of the re-issue of 1836, which are not shown to have differed materially from the description and drawings of the original patent. The language of the descriptive parts of both patents is nearly identical, and the drawings which make part of the descriptions are precisely alike. But though the specification of the earlier patent described the arrangement and primary combination of each element, the claim was in terms only for that larger combination which embraced all the elements. The re-issued patent of 1864, in claiming, as it does, not only the entire larger combination, but also those single elements, or constituent parts thereof, which are themselves combinations alleged to have been invented by the patentee (Goulding), is plainly therefore for the same invention. I need not say that a patentee's claim is as amenable under the statute, as is his specification. *Battin v. Taggart*, 17 *How.* 84. See, also, act of March 3, 1838, § 8, 5 *Stat. at L.* 191.

It has been further contended on behalf of the defendants that the act of Congress of May 30, 1862, under which the patent was extended, was unauthorized and beyond the power of Congress, because the patent had expired in 1842, and the invention had become the property of the public; and because, therefore, the act was in effect taking property which belonged to the public, and giving it to an individual. It assumes that every person had a right of property in Goulding's invention immediately after the expiration of his first patent, even before any attempt to appropriate it. It puts a right to appropriate that which is common, and

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in which there can be no private property until there has been an actual appropriation, on the footing of property acquired. And it overlooks the express grant of power to Congress by the Constitution. Section VIII. of article I. of that instrument, ordains that Congress shall have power "to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." This is a large power. It is not said when those limited times shall commence, how long they shall continue, or when they shall end. All that is left to the discretion of Congress. I see no reason why, under this commission, Congress may not secure to an inventor an exclusive right to his invention for a limited period, beginning at any time after the invention was made, and after it became publicly known. Congress may be trusted, and they are trusted, to take care that in protecting the inventor, the public shall not be injured. And it is in view of this, that our patent laws generally provide that the limited time during which an exclusive right may be enjoyed by the inventor, shall commence with the first revelation of his discovery to the patent office. Even in the act of 1862, which the defendants assail, all persons who had secured rights in the invention by appropriation, before the authorized extension of the patent, were protected.

I am not aware that it has ever been seriously thought Congress has not power, after a patent has expired, to provide for its extension. In *Blanchard v. Sprague*, 3 *Sumn.* 541, Judge STORY said, in effect, that there is no restriction upon the power of Congress to extend a patent to cases only where the invention had not been known or used by the public; and that an act of Congress granting a patent is not unconstitutional because it acts retrospectively to give a patent for an invention which was in public use; that all that is re-

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quired is that the patentee should have been the inventor. And in *Evans v. Eaton*, *Pet. C. Ct.* 337, it was asserted that the grant of an exclusive right to an invention for a limited time does not imply a binding contract that at the expiration of the period the invention shall become public property. And still more: it has been decided directly, that Congress has power to confer a new and extended term upon the patentee, even after the expiration of the first. *Blanchard Gunstock Turning Co. v. Warner*, 1 *Blatchf.* 274; *Blanchard v. Haynes*, 6 *West. Law J.* 83. And such is my opinion.

Next it is urged that even under the act of 1862, the commissioner was not authorized to grant the extended patent of that year, because the failure to obtain an extension before the expiration of the time for which the original patent was granted precluded the patentee from obtaining a valid renewal. This would have been so, doubtless, but for the act of Congress I have just been considering. But that act is to be considered as engrafted on the general laws, and they must be construed together. If, however, it be meant by this objection, that the lapse of twenty-two years between the expiration of the patent of 1826 and the application for its extension, established that the invention had been abandoned to the public, the answer is, 1st. That Congress was not of that opinion, or the act of 1862 would not have been passed. And 2nd. That the question has been passed upon by the commissioner of patents, and it has been decided that there was no abandonment. The action of the commissioner in granting an extension is conclusive evidence of all the facts he is required to find. *Clum v. Brewer*, 2 *Curt. C. Ct.* 506. Why it was that the first patent to Goulding was not extended before December 15, 1840; and why, therefore, there was an interval of more than twenty years after its expiration, and before the act of 1862 was

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passed, and before the extension, I am not informed by anything that appears in this case, though it was shown in a former suit on the extended patent. I must infer there were sufficient reasons for it, without concluding that the patentee had given up his invention to the public. There could hardly have been an abandonment without an intention to abandon, and whether such an intention existed was a proper subject for the commissioner's inquiry. I should not be justified in reversing the conclusion to which he came.

The next objection urged against the complainant's claim is, that the extended letters patent were granted for a period of seven years from August 30, 1862, the date when the letters were issued, instead of for the residue of a period commencing with the first issue of the patent of 1826. In other words, it is said the commencement of the period was wrong. To this it may be answered, that the act of Congress expressly authorized the renewal and extension for the term of seven years *from the time of such renewal and extension*, and not for the residue of a period, to be computed from the date of the original patent. The extension was, therefore, precisely in accordance with the provisions of the law. Reading the special act and the general acts together, the commissioner was authorized to issue letters patent for the invention for fourteen years from December 15, 1826, and for seven years from August 30, 1862, the latter term being an extension of the former.

The objection that the complainant's patent is void because the alleged improvement is only a mode of operation, and therefore not patentable, is not correct in fact. I understand the patent to be for a combination of mechanical devices, by which new and useful results are obtained.

Another defense, earnestly urged during the argument, rests upon an allegation of want of novelty in the

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Goulding invention. The defendants insist that the invention, as claimed in the third and fourth claims of the patent (the claims which it is alleged have been infringed), was known before 1826, and was described in *The Operative Mechanic*, published in Philadelphia in 1826, the publication purporting to have been from a second London edition.

It is by no means certain that this defense, if it be one, is open to the defendants. It is not distinctly asserted in their answer to the bill. Indeed, the novelty of the invention is not denied in any way (except perhaps parenthetically). Much less is there any assertion that the invention had been described in any printed publication in this or any foreign country, prior to Goulding's application for a patent. The nearest approach to an assertion of such a defense, which I can find in the answer, is the following clause, viz:—  
“And these defendants, further answering, say, that they are informed, believe, and so charge, that if said re-issued letters patent, so dated July 29, 1836, were surrendered by the said complainant, and instead thereof there was obtained by him certain re-issued letters patent for the same invention, as is alleged and described in said complainant's said bill of complaint, that such surrender was not made because of the said first re-issued letters patent being inoperative and invalid by reason of a defective specification, the error having arisen by accident and mistake, without any fraudulent or deceptive intention on the part of the said John Goulding, but that the same were fully operative and valid for all the intents and purposes that the said John Goulding pretended or designed that they should be, without any defective specification, and without any accident or mistake; that the said surrender, if made, was so made, and the said re-issued letters patent obtained by the said complainant with the fraudulent and defective intention of comprising

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and embracing in the said re-issued letters patent certain important changes and alterations in said first re-issued letters patent, which changes and alterations had become known and used by the public, and which were extensively used as public property, and did not belong or have any part in the invention of John Goulding, and he was not the original inventor thereof ; by reason thereof and because of which said fraudulent and deceptive intention the said re-issued letters patent were null and void." It is evident that the purpose of this clause was primarily, if not solely, to charge fraud in procuring the re-issue of 1836. And this is all that it really means. It does not set forth that there was no novelty in the invention, and I doubt whether it ought to be considered as presenting such a charge, even by any fair implication. If not, the defendants have no right to set up that defense now. A patentee who complains of an infringement, has a right, when his patent is to be assailed for want of novelty in the invention, to be informed distinctly by the answer to his bill, if he proceeds in equity, that such a ground of defense will be taken. I might, therefore, dismiss this defense with the single remark that the defendants cannot now be permitted to assert it.

But if it be admitted that the defendants are in a condition to allege want of novelty in the invention against the complainant's patent, they must begin with very strong presumptions against them. Not only is there a presumption in favor of the validity of the patent arising from its issue, its re-issue, its extension, and the re-issue of the extended letters, but suits have have been brought upon it at law and in equity, and the patent has been sustained. The evidence shows that in the district of Massachusetts, in the first circuit, an action at law was brought by the owner of the patent in 1863, against Bickford & Lombard, for an alleged infringement, and that a verdict and judgment for

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a large sum of money were recovered against those defendants. It is also proved that, in 1864, the complainant filed his bill in equity, in the same circuit, against the Agawam Woolen Company, complaining of an infringement of his patent, and praying for an injunction and account. To this bill an answer was put in, denying that Goulding was the first inventor, and asserting the invalidity of the re-issued patent. Proofs were taken, the case was subsequently heard on the evidence, and the circuit court entered a decree according to the prayer of the bill, sustaining the patent. On appeal to the supreme court, the decree was, after argument, affirmed on its merits. It is alleged in the defendant's answer to the present bill, and it was insisted at the argument, that these suits were collusive; that the first was not contested, and that the second was an amicable one, gotten up for the special purpose of procuring a decision when the real defense would not be shown. There is not a tittle of evidence in the case to sustain these allegations. And it is manifest in regard to the second suit, at least, that it was a seriously contested case.

The cases must, therefore, have full effect in strengthening the presumption that Goulding was the first inventor of the improvements described in the patent, the extension, and the re-issues, and that the patent is not void for want of novelty of invention. Such a presumption is further confirmed by evidence that various persons took licenses from the owner of the patent. In view of all this, it would not, in my opinion, be enough to sustain the defense, if the defendants had succeeded in raising doubts respecting the novelty of the invention. I agree, the cases decided in the first circuit, and at Washington, are not conclusive upon them, but, as was said by SHIPMAN, J., in *Tompkins v. Page*, 2 *Fish. Pat. Cas.* 580, they must show, by satisfactory and preponderating evidence, that they :

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antedate the invention set forth in the patent. In this I think they have failed. The witness relied upon by them is Barton H. Jenks, a most respectable manufacturer of machinery, and who had manufactured and sold the machinery patented to the complainant, under a license from him, granted April 12, 1864. Before referring to his testimony, I may remark, that the question is respecting the novelty of the improvements mentioned in the third and fourth claims of the re-issued patent of 1864. It is those which the complainant asserts the defendants have infringed. In Mr. Jenks' testimony, he has expressed his opinion that there is nothing new in the third claim, that is, in the *claim itself*. Whether he means by this, that there is nothing new in the claim, regarded separately from the specification to which it refers, he does not state. Probably he does. He is also of opinion that if there is anything new in the fourth claim, it is the combination of bobbins, lying parallel with the spindles for twisting, and with jaws, or their equivalents, for retaining the roving. The opinions of experts are evidence as to matters of science within their peculiar departments of knowledge; but the value of such opinions must be tested by the reasons on which they are built. Mr. Jenks does not appear ever to have seen any machine or combination older than Goulding's patent, substantially the same in principle as those described in the third and fourth claims of the re-issued patent of 1864. His opinions rest upon a comparison of those claims with plates of machines, or combinations of mechanism, found in "*The Operative Mechanic*," published in Philadelphia in 1826 (whether before or after the Goulding patent does not appear), and on a *resume* and plate of Arkwright's patent of 1776, found in *The American Journal*, vol. 1, published in Washington in 1828. Comparing the re-issue of the extended Goulding patent with these, he thinks there is no difference in principle, though

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there is in mechanical construction. And yet when asked, what is there new in the combination of the re-issued patent, he answers, that he finds none, "*other than the peculiar combination with the carding machine,*" previously mentioned by him.

After reviewing carefully the testimony of this witness, I am inclined to think when he gave his opinion that there is nothing new in the combinations claimed in the re-issued patent, he meant only that the machines, devices, or elements, out of which the combinations are formed, are all old. But if this was not his meaning, and if the largest latitude be allowed to his opinion, there is still a decided preponderance of evidence that the combinations described in the patent were new when the patent was first granted. Henry B. Renwick has been produced as a witness for the complainant, an expert of extensive knowledge. His opinions are before me. They are that, to the extent of his knowledge, the combinations mentioned in the third and fourth claims of the complainant's patent were new, at the time when the original patent was granted, his knowledge extending to all patents, English and French, before that date, and to descriptions from such books as he could find published prior to that time. More than this, he has compared the combinations with the plates and descriptions in "*The Operative Mechanic*" and *Law Journal*, referred to by Mr. Jenks, and has pointed out what appears to me very substantial differences. He has testified that one of the machines which Mr. Jenks thinks the same in principle as one of the combinations claimed by the complainant, has no feed apron, and no condensing apparatus of any kind, that it does not form a roving, that the bobbins are not revolved by means of a drum (in all these particulars unlike Goulding's combination), and that the machine is merely a bobbin and flyer machine for spinning flax. He is equally positive that the other machine referred

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to by Mr. Jenks is entirely different in principle from the combination claimed as the fourth in the re-issued patent, and he gives as reasons for his opinion that it is not a twisting machine, it has no reel or bobbin from which roving is taken, it has no row of spindles to which the bobbin is parallel, no traveling carriage, and no jaws, or their equivalents for retaining rovings, that, in fact, it is a machine for winding silk into skeins. Without pursuing this examination further, it is manifest that if Mr. Renwick is to be believed (and no attempt has been made to show that he has stated the facts incorrectly), the improvements claimed in the complainant's patent differ entirely from the machines or devices with which Mr. Jenks compared them, alike in principle, in mode of operation, in mechanical construction, and in the results produced. The defense of want of novelty of invention consequently fails.

The only other defense set up by the defendants that requires notice is, that the complainant has acquiesced in invasions of his rights until it would be inequitable now to assert them. Of this I discover no evidence. What is relied upon is a license granted by the patentees to Alfred Jenks & Son, given April 12, 1864, to make and sell at Bridesburg, or Philadelphia, in Pennsylvania, the machinery patented, upon the terms in the license specified. The terms were that the licensees should purchase a license for the *use* of the machinery manufactured and sold by them before delivery, that they should furnish monthly to Jordan (then the assignee of the patent), a statement of all persons to whom they had sold and delivered such machinery, and that they should stamp on such machinery so delivered, before its delivery, the words "Patented by John Goulding, December 15, 1826. Re-issued July 29, 1836. Extended August 30, 1862;" or some equivalent marks. How such a license as this

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can be regarded as acquiescence in any invasion of the complainant's rights, is more than I can comprehend. It is rather a distinct and positive assertion of them, a plain indication of an intent to hold responsible any and all persons who might purchase the machinery from the licensee and use it. There is evidence that the machines were sold to some parties without exacting any royalty for the patentee, but there is nothing to show that the patentee ever acquiesced in the use by the purchasers.

Upon the whole I am of opinion that every defense set up has failed, and that there is nothing which could justify my withholding a decree in favor of the complainant. But as the extended patent has now expired, there can only be a decree for an account.

Decree accordingly.

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SHOEMAKER v. THE NATIONAL MECHANICS'  
BANK.

*Circuit Court, Fourth Circuit ; District of Maryland,  
March, 1869.*

NATIONAL BANKS.—INJUNCTION.

A circuit court has jurisdiction, upon a proper bill filed by a stockholder of a national bank, to enjoin the officers of the bank from misapplying its funds to the prejudice of the stockholder's interest therein, by acts which are not warranted by the charter, or amount to a breach of trust.

The general principles which govern courts of equity in granting pre-

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liminary injunctions, and in dissolving them upon the filing of the answer,—stated.

A loan made by a national bank in excess of the restriction imposed by section 29 of the National Banks Act of June 3, 1864, 13 *Stat. at L.* 99,—which provides that the total liabilities to any banking association, of any borrower, shall not at any time exceed one-tenth of the capital stock,—is not void, upon that account. The loan may be enforced; though (by section 53) the bank is exposed to forfeiture of its franchise, and the officers participating are declared personally liable.\*

A national bank has power to lend money upon the note or other personal obligation of the borrower secured by a pledge of stock of a corporation as collateral security.

Section 8 of the National Banks Act of June 3, 1864, 13 *Stat. at L.* 101,—which authorizes such banks to exercise under that act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, &c., by receiving deposits, by buying and selling exchange, &c., *by loaning money on personal security*, and by issuing, &c., circulating notes,—contains five distinct grants of power; and neither grant is a limitation upon any other.

An averment that the officers of a bank have loaned its funds to a specified person "upon the collateral security of railroad stock," does not show a violation of section 8; for the phrase "collateral security" imports a security additional to the personal obligation of the borrower; and, by the fourth of the powers conferred by section 8, the bank may loan upon personal security not embraced in the first power.

### Application for an injunction.

GILES, J.—This bill is not filed to have the charter of defendant as a national bank declared null and void for the causes mentioned in section 53 of the act to provide a national currency, &c., passed June 3, 1864. This would not be the appropriate proceeding for such a purpose. That could only be accomplished by a suit instituted by the comptroller of the currency. But this is a bill filed by one of the stockholders in the National Mechanics' Bank of this city, to restrain the

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\* See the succeeding case.

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president and directors of the said bank from pursuing a course which, he alleges, is in violation of the requirements of their charter under the said act, and by which they are wasting the assets of the said bank, to the loss and injury of the complainant and its other stockholders.

Such being the object of the bill, if its allegations were admitted by the answer, or proved on final hearing to the satisfaction of the court, it would be its duty to restrain the officers of the said bank from any further misapplication of its funds which might result from any act not warranted by its charter, or which would amount to a breach of trust.

This is clear from the decision of the supreme court in the case of *Dodge v. Woolsey*, 18 *How.* 341. In that case the court says: "It is now no longer doubted, either in England or the United States, that courts of equity in both have jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction to restrain those who administer them from doing acts which would amount to a violation of charter, or to prevent any misapplication of their capitals or profits which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchise of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust."

The motion for this injunction has been heard on bill and answer. And the principle is now almost universally recognized, that, where the answer denies all the circumstances upon which the equity of the bill is founded, the court will refuse the writ of injunction.

It becomes necessary, therefore, to carefully examine the bill and answer; the bill, that we may learn what are the facts which it sets forth, and on which it

claims the equitable interference of the court, and the answer, that we may see if these facts are admitted or denied. Now there are many things stated in the bill, and replied to in the answer, with which we have nothing to do, on this motion. Whether the loan to Bayne, by the defendant, was made under such circumstances as will render the officers who made it responsible to the stockholders for any loss the bank may incur therefrom, can only be answered when this case comes before the court on final hearing. And it may be doubtful whether such question could even be decided on the pleadings in this case; it would seem to require a bill to be filed against the officers who made the loan individually. This is a bill against the bank in its corporate capacity. The allegations on which the preliminary injunction is asked are the following: "That in violation of said express prohibition, and in violation of the trust as aforesaid confided to its officers, the said bank and its officers lent to Bayne and Bayne & Co., of the funds or capital of the said bank, from time to time, divers sums of money, in the whole largely exceeding one-tenth of the capital stock of said bank actually paid in, and that for many months the amount of money so loaned exceeded three hundred thousand dollars." And it is further alleged that said loans were made upon collateral security of shares of stock, &c., some of which were spurious, and that among these were twelve hundred and fifty shares, purporting to be the stock of the Washington, Georgetown, & Alexandria Railroad Company, a corporation which the bill charged never had any legal existence, &c. And that said bank is joining in the prosecution of or has been made party to certain suits, touching or concerning the interests of said railroad company.

It also charges that the said defendant, by its officers and agents, has offered to pay into the circuit court of the United States for the Eastern District of

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Virginia the sum of twenty thousand dollars of the funds of said bank, in a cause therein depending, in which the said bank has no interest whatever, and to which it is not a party, and did actually pay in said cause two hundred dollars fees to commissioners, and did actually pay one hundred dollars to the trustees of Bayne & Co., upon some illegal and unauthorized agreement as to said securities, taken by them from Bayne, and that they are negotiating for and offering to expend the money and funds of said bank in and about the repairs and reconstruction of the bridge of the said railroad company across the Potomac river, in which said bank has no sort of interest, and cannot legally have any. Said bridge, it is estimated, will cost over one hundred thousand dollars to repair it. And it concludes with a prayer that the said bank, its officers, agents, and attorneys, may be restrained from farther prosecuting or defending any one or more of said suits at the cost or charge or in the name of said bank.

The answer admits that Bayne & Co. did pledge with its cashier, early in the month of February, 1866, as collateral security for its money loaned and advanced to the said firm, one thousand two hundred and fifty shares of the capital stock of said railroad company, of the par value of one hundred dollars each, and that the trustees of Bayne & Co. did subsequently, for one hundred dollars, assign all the equity of redemption of said stock to the cashier of this defendant.

It also admits that as a holder of stock of the said railroad company, it did agree with certain stockholders of said company to advance a portion of the sum of twenty thousand dollars, which was offered to be paid into the circuit court of the United States for the Eastern District of Virginia, in a cause in which the said railroad company and others were defendants, and Adams Express Company was complainant, to abide

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the decision of said cause, with the purpose of preventing the said railroad from passing into the hands of a receiver, to be appointed by said court; but said offer was refused by said court, and no money was paid on account thereof, and that this defendant was to have been adequately secured if said money had been actually advanced, and that it did advance about forty dollars, part of defendant's commissioners' fees, in said cause. And this defendant denies that it is negotiating or offering to expend its money or funds in the repair and reconstruction of the railroad bridge across the Potomac. It also denies that it, or any of its officers, at the time said stock was issued in the name of its cashier, or previous thereto, had any knowledge or good reason to believe that the said railroad company had no legal existence, or that the certificates were fraudulently issued, but that as late as May, 1866, the stock of the said railroad company was held and esteemed as a valuable stock, at par or over par, and that as late as the middle of May, 1866, large loans were effected upon the pledge of its certificates of stock at or about par.

Now, the only fact admitted in the answer, pertinent to the present inquiry, is that the defendant did receive from Bayne & Co. a pledge of the railroad stock as *collateral security* for loans made to said firm, and that said bank is now, in company with other stockholders of said railroad, engaged in suits, upon whose final decision depends the very existence of said road and the value of its stock. Will these facts warrant the granting of a preliminary injunction? Now, the granting or refusing of an injunction is a matter resting in the sound discretion of a court of equity. It is one of the highest powers confided to a court of equity, and its exercise ought, therefore, to be guarded with extreme caution, and the remedy applied only in very clear cases.

As to the first charge in this bill against the defend-

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ant, in reference to the amount loaned to Bayne & Co., in violation of section 29 of the act of Congress passed June 3, 1864, (under which act the defendant became a national bank), I would only say that the loan made under such circumstances is not void—it can be enforced as any other loan made by the bank. This I apprehend is clear, from the fact that section 29 provides no penalty for its violation, and section 53 of the same act, for all violations of the provisions of the said act, provides two penalties : first, a forfeiture of the privileges and franchises of the said bank, derived from the said act, to be adjudged in a suit brought for that purpose in the Federal court; and second, a personal liability by every officer of a bank who participated in or assented to such violation, for all damages which the bank may sustain in consequence thereof.

Indeed, this clause was not pressed in the very able argument of the learned counsel who closed on behalf of complainant. The point so forcibly made by him was that the defendant was prohibited by its charter from making this loan on a pledge of stock, and if so, no title to this stock passed from Bayne & Co. to the defendant. Clearly, if the defendant's title to this stock depended on a purchase as an investment by it, such purchase would be beyond its corporate powers, and void. The learned counsel, however, contended, that by the true construction of section 8, this loan was not embraced among the enumerated powers of the bank,—“that no loans are valid except those made on personal security.” The language of that section is, “and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal secu-

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Shoemaker v. National Mechanics' Bank.

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rity, by obtaining, issuing, and circulating notes, according to the provisions of this act.

I understand that the language I have quoted contains five distinct grants of power, and that no one grant is a limitation on any other. By the first, the bank is authorized to discount promissory notes, drafts, bills of exchange, and other evidences of debt ; second, to receive deposits ; third, to buy and sell exchange, coin, and bullion ; fourth, to loan money on personal security (I understand by this, on any other personal security than is mentioned in the first grant) ; fifth, to obtain, issue, and circulate the national currency. If I am right in this construction, then the loan to Bayne & Co. was authorized by the said section, as the charge in the bill is that the loans to Bayne & Co. were made upon paper evidences of debt ; upon bonds, notes, checks, &c. ; and upon collateral security of stocks, &c. ; and the answer states that the stock in said railroad was pledged with its cashier as collateral security for its money loaned. If collateral security, then collateral to personal responsibility of Bayne & Co., on the notes, checks, and bills of exchange, cashed for said firm by this defendant ; for collateral security in bank phraseology means some security additional to the personal obligation of the borrower. But admit that this construction is doubtful, it is not so doubtful as that construction which would limit the banks to the power of loaning money only on personal security, and deny to them the power of taking a pledge of stock as collateral security for notes or bills of exchange cashed by them. And, as I said before, a court of equity should never grant a preliminary injunction in a doubtful case.

However, I have no doubt that the taking this collateral security from Bayne & Co. was a valid transaction, and whether it will ever avail the defendant anything, will depend upon the decisions of those tribu-

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nals before whom is now pending the question of the validity of the charter of the said railroad company, and the character of its stock.

The preliminary injunction asked for in this case is refused.

For authorities to sustain the view I have taken of the law governing this case, I refer to the following cases : *Bates v. Bank of Alabama*, 2 *Ala.* 462 ; *Magruder v. State Bank*, 8 *Ark.* 9 ; *Bank of Middleburg v. Bingham*, 33 *Vt.* 636 ; *Farmers' Bank v. Buechard*, 33 *Id.* 348 ; and *Rock River Bank v. Sherwood*, 10 *Wis.* 230.

Injunction refused.

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STEWART v. THE NATIONAL UNION BANK OF  
MARYLAND.

*Circuit Court, Fourth Circuit ; District of Maryland,  
October, 1869.*

CREDITOR'S BILL.—POWERS OF NATIONAL BANKS.—  
VOID CONTRACTS.

By a creditor's bill it appeared that the judgment debtor had assigned certain assets, which complainant sought to reach, to a national bank, made a defendant, as collateral security for a loan, and had afterwards, but before the Bankrupt Act of 1867 took effect, made a general assignment to trustees for the benefit of creditors. The bill charged that the loan made by the bank was void for exceeding the corporate powers, and that the bank therefore acquired no title to the assets received as collateral. The general assignment was not

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assailed. *Held*, on demurrer, that the bill showed no right in the complainant to relief from the assets in question ; for, if they did not vest in the bank by the assignment attacked by the bill, they must have vested in the trustees under the general assignment.

A loan made by a national bank in excess of the restriction imposed by section 29 of the National Banks Act of June 3, 1864, 13 *Stat. at L.* 99,—which provides that the total liabilities to any banking association, of any borrower, shall not at any time exceed one-tenth of the capital stock,—is not void upon that account. The loan may be enforced ; though (by section 58), the bank is exposed to forfeiture of its franchise, and the officers participating are declared personally liable.\*

Although a loan made by a corporation appear to be in excess of a limit imposed by statute, and therefore not enforceable, yet, if it has been executed by the parties, a court of equity will not interpose, at the suit of a creditor of the borrower, to cancel the transaction and compel a return of the securities, but will leave the parties where it finds them.

Demurrer to a bill in equity.

GILES, J.—The complainant in this case filed a general creditor's bill against the defendants, alleging, among other things, that he was and is a creditor of Bayne & Co. to a large amount ; that Bayne & Co. are bankrupts ; that the National Union Bank, the National Mechanics' Bank, and the National Exchange Bank are national banks, organized under the act of Congress entitled " An Act to provide a national currency," approved June 3, 1864 ; that section 29 of said act provides " that the total liabilities to any association of any person or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid ;" that on May 3, 1866, the loans to Bayne & Co. by the National Union Bank amounted to two hundred

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\* See the preceeding case.

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and eighty-seven thousand six hundred and forty-one dollars and thirty-one cents ; by the National Mechanics' Bank to three hundred and seventy-seven thousand four hundred and forty-four dollars and seventeen cents ; and by the National Exchange Bank to one hundred and forty thousand four hundred and thirty-one dollars and twenty-nine cents ; which loans were made with the knowledge and permission of the directors of said banks, and were not within the reservations or provisos of section 29 ; that the largest part of the assets of Bayne & Co. are deposited with and held as collateral security by said national banks, defendants, for the illegal loans, so made by them to Bayne & Co. ; that of such collaterals, the National Mechanics' Bank held three hundred and eighty-five thousand eight hundred and sixty-four dollars, the National Union Bank three hundred thousand one hundred and thirty-nine dollars, and the National Exchange Bank one hundred and sixty-four thousand two hundred and fifty dollars ; that the capital stock of the said National Mechanics' Bank is six hundred thousand dollars, of the said National Union Bank is one million two hundred thousand dollars, and of the National Exchange Bank four hundred thousand dollars ; that the loans to Bayne & Co. by said banks were, on May 3, 1866, largely in excess of the ten per cent. of their respective capitals actually paid in, and therefore contrary to law, and a fraud on the rights of complainant and other creditors of Bayne & Co. The bill prays for a discovery of the amount and nature of said collaterals, also of all transactions between Bayne & Co. and the banks, and for an order of this court transferring the collaterals so held by the banks to the assignee in bankruptcy of Bayne & Co. for adjustment of rights between their creditors, for a decree in favor of complainant, and for general relief.

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To all that part of the bill which attacks these loans made by the banks on the ground that they are void by section 29 of the act of 1864, and prays for a decree of this court ordering them to be transferred to the assignee of Bayne & Co., the banks demur ; and for cause of demurrer show "that according to the true construction of the act of 1864, the complainant has no right to call upon this court to examine into and decide upon the matters above demurred to, but the same are examinable only at the instance and suit of the government of the United States and its authorized officer, and in conformity with the provisions of said act." "And that the said matters, as alleged, do not affect the validity of the said loan by these defendants to the said Bayne & Co., nor do they destroy, invalidate, or affect the title of these defendants to the said collaterals and securities."

The issues raised by this demurrer are two. First, the right of complainant to the relief sought in his bill against the banks ; and second, the validity under the act of Congress of the loans so as aforesaid made by the said banks to Bayne & Co.

There is also a prayer in the bill for a decree for an account to be filed by Wm. Bayne, Allen A. Chapman, and Horatio R. Riddle, trustees under a deed of trust executed by Bayne & Co. on May 5, 1866 ; but with that part of the bill we have nothing to do at present. This case has been heard alone upon the bill of complaint, and demurrer filed by the banks, and the question to be now decided by the court is : Does the bill show such a case as entitles the complainant to the relief he seeks against the said banks ? He prays for a decree against the said banks compelling them to transfer and hand over to the assignee in bankruptcy of Bayne & Co. all the collaterals which the banks received from Bayne & Co., as security for the loans made to them from time to time by the banks. Now,

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could such a decree be passed by this court and such relief granted, in view of the fact that Bayne & Co. had by a deed of trust (as is shown), on May 5, 1866, conveyed all their assets, of whatever kind, to trustees for the benefit of their creditors, the deed being executed before the passage of the bankrupt act, and more than six months before Bayne, Hough, & Honeywell filed their petitions to be declared bankrupts. That deed has not been assailed, although allegations are made in the bill against the trustees, and they are charged with fraud and collusion. Now, it appears to me that if the complainant be right in his view and construction of section 29 of the general banking law of 1864, "that all loans made to any one beyond the amount prescribed in that section are absolutely void ; and that the banks have no title to any collateral security given to them for such loans," yet he is not entitled to the relief he now seeks. Under such construction of the law, the title to these collaterals passed by the deed of trust, and if the trustees have failed duly to execute the trust confided to them, a court of equity would remove them and substitute others in their place ; and, if the bill filed for that purpose made the banks parties, the court could decree such relief as would be equitable and just under the circumstances.

This disposes of that part of the case now submitted to me, and I might rest my decision here ; but as the second issue raised by the demurrer has been argued at length and with great ability by the complainant and the learned counsel engaged in the cause, and as I have carefully examined all the authorities referred to, I shall state briefly the conclusions to which I have arrived as to the true construction of section 29, and of the rights of the parties to such loans as are here alleged. Now, it is observable that this section only provides, "that the total liabilities to any association, of any person, or of any company, corporation, or

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firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock actually paid in." It contains no penalty, and no provision "that such loans shall be void."

In the very next section (section 30), which regulates the rate of interest, it is provided, that "the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest," &c. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in an action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same.

So in section 31 it is enacted, that every association in certain cities "shall always keep on hand, in lawful money, twenty-five per centum of the aggregate amount of its notes in circulation and its deposits. And if any association, whose lawful money shall fall below the amount aforesaid required to be kept on hand, shall fail, for thirty days after notice, to make good such reserve, the comptroller of the currency, with the concurrence of the secretary of the treasury, may appoint a receiver to wind up the business of such association."

See, also, section 52, in which all transfers of the notes, bonds, and other evidences of debt owing to any association, and of any and all property belonging to the association; made after the commission of an act of bankruptcy, &c., are declared null and void.

Now, when you read these sections, and find no such provision of forfeiture in section 29, but find that in section 53 provision is made, "that if the directors of any association shall knowingly violate any of the provisions of this act, all the rights, privileges, and

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franchises of the association, derived from this act, shall be thereby forfeited—such violation shall, however, be determined and adjudged by a proper district or circuit court, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved”—the conclusion seems to be irresistible, that Congress never intended by section 29 to forfeit all loans made in excess of the amount specified in section 29, no matter whether they were made through inadvertence or by mistake, for the forfeiture provided for in section 53 depends upon the guilty knowledge of officers making it.

The general banking powers are granted by section 8 of the act in the following terms: “And exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security, and by obtaining, issuing, and circulating notes according to the provisions of this act.” The grant of banking powers is full and ample in this section, and in view of the whole act it appears to me that section 29, like many other sections of the act, is directory only, and for its violation there is no forfeiture but the one provided for in section 53. That section, it is admitted, applies to all violations of section 29, with guilty knowledge, and there can be no clearer rule for the interpretation of statutes than to hold that, where Congress has expressly provided a penalty for the commission of any act, you are not so to construe the statute as to add, in addition, any common law forfeiture or penalty. So that it appears to me that although these loans made by defendants, the three banking associations above named, exceeded in amount one-tenth part of the amount of their capital stocks actually paid in, the loans

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are not void, and if the associations were now in court, seeking to recover the same, I should have great difficulty in permitting Bayne & Co., or any one claiming through them, to set up this defense.

But can there be any doubt of this principle, that where the contracts are executed, even if the court would not have enforced them, the court will leave the parties where it finds them, giving aid or relief to neither? The learned counsel for the complainant, in his very full argument, seemed to feel the force of this principle, and to try to escape from its application. He contended that it did not apply to this case, and that if these defendants could not sustain an action in a court of law on these contracts, the court must overrule the demurrer.

The cases to which he referred, I have examined, and it does not appear to me that they sustain this position. In the case of *Bank of United States v. Owens*, the court decided that the bank could not recover upon a note which had been discounted at more than six per cent. interest. The bank charter forbid the taking a greater rate of interest than six per cent., but it did not declare such a contract void. The court held such a contract void on general principles, and that courts could not lend their aid to enforce such contracts. I have examined the charter of the bank, and it contains no clause imposing any penalty whatever on the taking of more than six per cent. interest. It was, then, a prohibition without any specific penalty, and Congress must be supposed to have left the violation of the section to the common law penalty of a denial by the courts to enforce such a contract.

The case of *Leavitt v. Palmer*, 3 *N. Y. (3 Comst.)* 19, was decided on similar grounds. In that case the court held that the notes issued by an institution in violation of the provisions of the general banking law of New York, which might circulate as a currency,

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and the deed of trust to secure the same, were void. It did not touch the question of the validity of the original advance by the London house.

The case of *Seneca County Bank v. Lamb*, 26 *Barb.* 595, only decides what the supreme court had decided in 2 *Pet.*, that a bank that has discounted paper, taking more than six per cent. interest, cannot recover upon the paper thus discounted. The court, in their opinion, say: "*It will leave the parties to such a contract where it finds them.*"

To the same effect is the case of the *Bank of Chilliscothe v. Swayne*, 8 *Ohio*, 280; and the case of the *Miamai Exporting Co. v. Clark*, 13 *Id.* 1.

In the case of *Albert v. Savings Bank of Baltimore*, 2 *Md.* 160, the court only decided that although the contract was executed, yet the *cestui que trust* whose property had been assigned unlawfully to the bank could have relief in a court of equity. That is not this case.

The case of *Coppell v. Hall*, 7 *Wall.* 542, only decided that upon a contract for the purchase of cotton, in violation of the non-intercourse acts, during the late civil war, there could be no recovery in the courts of the United States.

The case of *Hagan v. Walker*, 14 *How.* 29, is not applicable to this case; and the case of *Chancy v. Duke*, 10 *Gill & J.* 11, is, if applicable at all, in favor of the defendants. The court of appeals in that case held that the mere omission of the vendor of a slave to give a bill of sale as required by the act of 1817, ch. 112, would not prevent his maintaining an action for the purchase money.

I consider the law of this case settled by the decisions to which I shall now refer. In the case of *Mott v. United States Trust Co.*, 19 *Barb.* 569, the court held that a person who has borrowed money from a savings institution upon his promissory note, secured by a

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pledge of bank stock, was not entitled to an injunction to prevent the prosecution of the note on the ground that the savings bank was prohibited by its charter from making loans of that description. So, in the case *Tracy v. Talmage*, 14 *N. Y.* (4 *Kern.*) 162, the court held, that while the certificates of deposit given in violation of law were void, yet that the plaintiff could recover whatever the stocks sold were worth at the time of sale, leaving the contract of sale, so far as it had been executed by payment or its equivalent, undisturbed ; and in the case of *Bates v. Bank of the State of Alabama*, 2 *Ala.* 459, the court decided that a clause in the bank charter similar to section 29 of the act of 1864 was directory merely, and that, if it were disregarded, no one party to its violation could take advantage of it.

The case of *Harris v. Runnels*, 12 *How.* 80, is directly in point, and sustains the view I have taken of the construction of section 29. That was an action brought to recover the price of slaves brought into Mississippi, in contravention of a statute of that State regulating the importation of slaves. Section 4 provided that no slaves should be brought into the State without a previous certificate, &c., being obtained. Section 6 declared that both the seller and buyer of such slaves shall pay one hundred dollars for every slave so sold and imported in violation of the law. The supreme court says that "the two sections, considered conjunctively, seem to us to imply that the penalty only, without any other loss to either the seller or buyer, was to be inflicted," and the court held that the contract of sale was not void.

Now, although by the bill as originally filed, it would appear that the said banks held collaterals to a larger amount than their loans and advances, yet by the amended schedule and agreement of counsel in reference to the same, it is clearly shown that the advance

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The Acorn.

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made by the banks to Bayne & Co. far exceeds in amount the value of the collaterals they received from said firm.

The court, for the reasons I have given, will sustain the demurrer filed by the banks, and will sign a decree dismissing the bill as to them.

Bill dismissed.

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THE ACORN.

*District Court, Eastern District of Michigan ; June T., 1870.*

FORFEITURE.—REGISTRY OF VESSELS.—RECORD OF  
NATURALIZATION.

The act of April 25, 1866, 14 *Stat. at L.* 40, —directing the secretary of the treasury to issue enrollment and license to certain vessels therein named,—is mandatory in its terms; and an oath, in accordance with the provisions of section 4 of the act of December 31, 1792, 1 *Stat. at L.* 287, to obtain enrollment and license under the former act, is unnecessary.

An oath thus made to procure enrollment is extra-judicial, and of no effect; and though the oath was false, the provisions of law declaring a forfeiture in such cases have no application.

Where, in a libel for forfeiture for alleged violation of the registry laws, the claimant is charged with not being the owner of the vessel, and all the evidence relating to the ownership is introduced by the government, which tends to prove rather than disprove such ownership on the part of the claimant, such evidence must be taken as a whole; and the claimant need not introduce evidence upon the subject, to establish his ownership.

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In a libel for such cause, where the claimant is charged with not being a citizen of the United States at the time of the enrollment, and, in order to refute such charge, he introduces in evidence an exemplified copy of the record of his naturalization under the United States laws in a court of competent jurisdiction, he need not also prove the preliminary proceedings necessary to give the naturalizing court jurisdiction.

The order of a court of competent jurisdiction, admitting an alien to citizenship, is in the nature of a judgment, and, in the absence of fraud, is conclusive as to the question of the requisite length of residence of the naturalized citizen in the United States.

The distinction between cases in which judgments may and those in which they may not be impeached collaterally, may be stated thus: They may be impeached by facts involving fraud or collusion, but which were not before the court or involved in the issue or matter upon which the judgment was rendered. They may not be impeached for any facts, whether involving fraud or collusion or not, or even perjury, which were necessarily before the court and passed upon.

### Hearing on a libel of information.

This was a libel of information and seizure for forfeiture for alleged violation of the registry laws.

The libel alleged as cause for forfeiture, that the oath taken by David Muir, the claimant, to obtain enrollment and license of the bark, was false in the following particulars:

1. That at the time of taking the oath the said David Muir was not a citizen of the United States, as in said oath alleged.
2. That he was not the true and only owner of the vessel.
3. That there were subjects of a foreign prince or State, directly or indirectly, by way of trust, confidence, or otherwise, interested in the vessel, or in the profits or issues thereof.

The libel in the second article also alleged the fraudulent use of an enrollment and license for the bark, to which she was not entitled.

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The Acorn.

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The claim, answer, and exceptions of David Muir, 1st, alleged his ownership of the vessel ; 2nd, excepted to the jurisdiction of the court ; but as this ground of defense was abandoned at the hearing as untenable, no notice was taken of it by the court ; 3rd, admitted that claimant took the oath as alleged in the libel, but denied its falsity, and alleged the truth of the statements contained in it ; 4th, denied the fraudulent use of an enrollment and license, as alleged in the second article of the libel ; also contested the forfeiture, and claimed costs.

The proofs taken, and the facts of the case, sufficiently appear in the opinion of the court.

*A. Russell*, for the United States.

*Newberry, Pond, & Brown*, for claimant.

LONGYEAR, J.—By an act of Congress approved April 25, 1866, 14 *Stat. at L.* 40, the secretary of the treasury was directed to issue an American enrollment and license to the bark *Acorn*, among a large number of other vessels named in said act, and accordingly the bark was enrolled and licensed at Chicago, July 11, 1866. The enrollment purports on its face to be in pursuance of the act of April 25, 1866, and also of the general acts of Congress providing for the enrollment and license of ships or vessels, and for the regulation of the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States.

The forfeiture is claimed in this case under section 4 of the act of December 31, 1792, 1 *Stat. at L.* 287, the provisions of which, as to forfeiture, have been held by the supreme court, in the case of *The Mohawk*, 3 *Wall.* 566, to apply to enrolled and licensed as well as to registered vessels. It is contended, however, on behalf

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of the claimant, that the act of April 25, 1866, directing the secretary of the treasury to issue an enrollment and license, is mandatory, and that under it section 4 of the act of 1792 has no application; that the questions of citizenship of the owner and the ownership of the vessel do not arise, and that no oath could be lawfully required as a preliminary requisite, as required by said section 4, and that therefore the oath which was made to procure the enrollment, as alleged, was extrajudicial, and no forfeiture could be claimed, even if the same was false.

First, then, as to the effect of the act of April 25, 1866. It is true, as claimed, that the act is mandatory in its terms. The language is: "The secretary of the treasury is hereby directed to issue American registers, . . . or enrollment and license, to the following named vessels, that is to say;" and then follows a long list of vessels, including the said bark Acorn. No conditions are imposed, and no preliminary steps are prescribed by the act. The attention of the court is challenged to the fact that in other acts of Congress, for a like purpose, conditions are imposed, and preliminary steps are prescribed, as an evidence that in this instance Congress intended the enrollment and license to issue absolutely and immediately.

Looking at these acts alone, the court would have no doubt that the construction claimed is the correct one. But in view of the general laws of Congress upon the subject of registry, enrollment, and license, and of the objects and purposes to be accomplished thereby, viz: to build up and foster a commerce purely American, and to protect the revenue, serious doubts were suggested, and the court felt it an imperative duty to seek for some other construction of the act than that contended for, and more in keeping with the object and purpose of the registry laws. Thirty-one vessels in all are covered by the act, and it is difficult to conceive

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The Acorn.

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that Congress could have intended so important and dangerous an innovation upon its established system as it would be to give the act the effect suggested, and the court would not do so, only as it might feel compelled to, by force of the clear and unmistakable meaning of the words of the act.

As my brother, Judge WITHEY, of the western district, has a case before him, *United States v. The Advance*, precisely like this one, and was therefore directly interested in a correct decision of the questions of law arising in this case, I suggested to him my doubts upon this question, and after consultation with him, and mature deliberation, I see no escape from the conclusion that the act, by its own force, admits the vessels named in it to registry, or enrollment and license, peremptorily, and without any prerequisites or conditions whatever. After turning the question over and over, and viewing it on all sides and in all aspects, I have found myself unable to come to any other conclusion at all satisfactory to myself, without the necessity of interpolating into the act words of material import, which of course the court cannot do.

The act is mandatory in its terms. "The secretary of the treasury is hereby directed to issue American registers, . . . or enrollment and license," &c. Now, in order to hold that the requisites and conditions prescribed by the general laws must exist and be complied with before the secretary of the treasury can be called upon to obey the mandate, it is necessary to interpolate an entirely new element into the act; because the act is absolute, unconditional, and immediate in its operation and effect, and to hold as above indicated, would make it conditional and contingent, and would postpone its operation until other acts, not mentioned or referred to in terms or by necessary implication, have been complied with.

Foreign vessels cannot be registered or enrolled and

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The Acorn.

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licensed under the general laws, but there can be no doubt that Congress has the power, by special act, to nationalize such vessels, and confer upon them all the rights of registry, and enrollment and license, independent of the general laws. In the case of *The Acorn*, and of all the other thirty-one vessels named in the act of 1866, except three which are described as "Canadian built," no reason whatever is assigned, or can be deduced from its language or recitals, why the act was necessary, or why it was passed. We may presume that it was to cure or remove some disability or disabilities under which the respective vessels labored, and on account of which they could not be registered, or enrolled and licensed under the general laws. But if we are to resort to presumptions, we must presume that *all* disabilities were intended to be cured or removed, where *none* are specified.

The act is plain, direct, positive, and peremptory in its language. There is no ambiguity in its provisions, nor room for construction. It is not based upon any requisite, qualification, or condition, or upon any want of them, relating to the vessel, its owner, master, or persons interested, at least so far as *The Acorn* is concerned, but is independent and regardless of all requisites, qualifications, or conditions. It is a simple command to an officer of the government to do a certain thing. Now, to say that he need not do the thing commanded, or only in case certain requisites and conditions exist and are complied with, among which is the oath to obtain enrollment and license here in question, is clearly to interpolate into the act what is not there in terms, and what cannot be inferred from the language used, by any fair or satisfactory construction of it.

I hold, therefore, that no oath to obtain enrollment and license was necessary in this case, and hence that the oath which was made, and upon the alleged falsity of which a forfeiture is predicated, was extra-judicial.

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void, and of no effect. The provisions of law, therefore, declaring a forfeiture in such cases, have no application to this case.

In this view of the first branch of the case, a consideration of the remaining points is unnecessary to its disposition. But in view of the importance of the questions involved, and in order to show that, regardless of the conclusions arrived at upon the first point, the result must have been the same, a consideration of the remaining points may not be unprofitable.

2. The second point involved, regards the ownership of the vessel. In cases of this sort the burden of proving that the ownership of the vessel and the persons interested in her are not as stated in the oath, is upon the United States. It was contended, however, that it is only necessary, in the first instance, for the United States to show probable cause, or a reasonable suspicion, and then the burden of proof changes. Without stopping now to inquire into the soundness of this position, we will proceed at once to examine the evidence upon this point.

The testimony of Austin A. Smith, and that of John S. Clark, taken by commission in Canada, on behalf of the United States, comprises all the proof in the case upon the question of ownership.

Smith testifies that for three years previous to July 1, 1867, he was book-keeper and clerk, and a part of that time was employed by Muir Brothers, at Port Dalhousie, in Canada; that the business of the Muir Brothers, when he was in their employ, was ship-builders, ship-owners, and ship-chandlers. The witness then proceeds as follows:

“Previous to the transfer of the vessels to Bryce Muir, one of the brothers, they owned the barks Alexander, Acorn, Advance, and Niagara, and the schooners Arctic, Ayr, and Asia. I do not recollect the date of the transfer, but believe it was somewhere during the

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year 1866. I was acquainted with the bark Acorn, and the Muir Brothers owned her up to the time of the transfer mentioned in last answer. Up to the said transfer all of the parties in the firm of Muir Brothers, consisting of Alexander Muir, Bryce Muir, William Muir, David Muir, and Archibald Muir, were interested in the profits of the said bark, and that they were solely so interested.

“The said partners, up to the time of the transfer to Bryce Muir, were equally interested in the said bark Acorn, and from the date of the said transfer, the said Bryce Muir was solely interested up to the time of another transfer thereof to David Muir; after the last transfer the said David Muir was solely interested.

“The Muir Brothers, before the transfer to Bryce Muir, were the owners of, and kept the books of the accounts of the said bark, and Bryce Muir afterwards up to the time of the transfer to David Muir, and after the transfer last mentioned, the said David Muir. The said firm had nothing to do with the profits after the said first transfer.”

Clark testifies that he is a collector of canal tolls (for what canal or where is not stated), and then proceeds as follows: “During the year 1866, David Muir was the owner of the bark Acorn. I do not know who was or were interested in her profits in the said year. I never received any information from David Muir on the subject. My knowledge as to his ownership is derived from the fact that the said bark in passing through the canal that year was reported to me, and entered on my books as owned by the said David Muir.”

This comprises all the proofs made or offered on either side as to the ownership of the vessel, and as to the persons interested in her profits. On this proof, it is contended, on behalf of the United States, that, having shown that the vessel once belonged in part to other owners, it is incumbent on the claimant to show

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that, at the time he made the oath for enrollment, the interest of the other owners had been sold and duly transferred to him ; that the bills of sale, or other conveyance, by which the same was transferred, should have been produced, and that their non-production raises a presumption against the claimant's title, and that the statements of the witnesses, above quoted, as to transfer to and ownership by David Muir, are not competent to prove such transfers and ownership. Such would, undoubtedly, be the rule as applied to evidence offered by the claimant to prove his title after a case had been made against him, making such proof necessary. But it must be borne in mind that all the testimony there is in this case in regard to a transfer from the other former part-owners to Bryce Muir, and from him to David Muir, the claimant, is produced on behalf of the United States, and although it is somewhat indefinite as to time, it is as definite, direct, and positive, as the other portions of the same testimony tending to prove that other persons were once interested in the vessel. It is a part of the case for the government, as made by its proofs, and it cannot be rejected by any known rule of law. The testimony upon the subject of ownership, as above recited, must be taken as a whole, and being so taken, if it proves anything, it proves that David Muir was the sole owner, and was solely interested. To say the least of it, it fails to make out such a case as makes it incumbent upon the claimant to make any proof upon the question of ownership.

Therefore, the allegation of the libel that said David Muir, at the time of making the oath for enrollment, "was not the true and only owner of the vessel," and that "there were subjects of a foreign prince or State, directly or indirectly, by way of trust, confidence, or otherwise interested in the said bark," &c., are not sustained.

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3. As to the citizenship of the claimant David Muir. For the purpose of sustaining the allegation of the libel that David Muir was not a citizen of the United States, as alleged in his oath for enrollment, testimony was introduced on behalf of the United States, tending to show that for several years previous to the year 1866 (the year in which the vessel was enrolled), the said David Muir had resided in Canada, and was assessed and paid taxes there, and that he was registered as a voter there as late as the year 1863.

To meet the case thus made against him, the said David Muir introduced in evidence an exemplified copy of the record of his naturalization, under the laws of the United States, in the superior court of the city of Chicago, being a court of competent jurisdiction, January 27, 1866. This record was offered and admitted in evidence without objection, but on the final argument, counsel for the United States took the following exception to its sufficiency: That the preliminary proceedings necessary to give the naturalizing court jurisdiction, viz: the petition, declaration of intention, and oath of allegiance, are not proven. It is recited in the record that such proceedings were had, but it is contended that such recitals are not evidence, but that the proceedings themselves should have been proven. It is doubtful whether this objection does not come too late, but even if in time, the weight of authority is decidedly against the position that such preliminary proceedings must be proven, and I see no reason for holding otherwise in this case. See *Ritchie v. Putnam*, 13 *Wend.* 524-6; *Stark v. Chesapeake Ins. Co.*, 7 *Cranch*, 420.

It is contended also on the part of the United States, that inasmuch as the order of naturalization could be made only on proof of continued residence in the United States for five years immediately preceding, it must in this case, in view of the evidence on behalf of the

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United States, above mentioned, have been made upon false testimony as to the fact of such residence. This presents the question—Is the order admitting an alien to citizenship conclusive as to the question of the requisite length of residence in the United States, or is that question open to inquiry collaterally?

The proceeding to obtain naturalization is clearly a judicial one. A hearing is required to be had in open court, and the right can be conferred only by the judgment of the court, and upon satisfactory proof. It, therefore, has all the elements of a judgment. That it has the character and attributes of a judgment, and is equally conclusive, the authorities are entirely uniform. See *Spratt v. Spratt*, 4 *Pet.* 393, 407; *McCarthy v. Marsh*, 5 *N. Y.* 263, 279, 284, and authorities cited; *In re An Alien*, 7 *Hill*, 137-8; *In re Clark*, 18 *Barb.* 444; *Ritchie v. Putnam*, 13 *Wend.* 524-6.

The question of the requisite length of residence of the applicant is a question of fact, and, as appears by the record, was directly before the court and acted upon. Proofs were taken, and the court made a decision upon them. This court is now asked to decide that the superior court of the city of Chicago, before which the naturalization proceedings were had, erred in deciding as it did, or, in other words, that the fact in question is not as there found. It does not appear what the particular proofs or statements of the witnesses before the naturalizing court were, but, whatever they were, they were satisfactory to that court. Neither does it appear by the proofs in this court that the testimony here adduced to show that the fact of residence was not as there found, was or was not before that court. But concede, as was probably the case, that it was not, then it comes here in the nature of newly discovered evidence, and this court is asked to allow it to impeach the naturalization, and as to a fact, too, which was directly before and acted upon by the naturalizing

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court. This is contrary to all precedent and all authority. To allow it would tend to unsettle the sanctity of the final adjudication of judicial tribunals, and render them of no more binding or conclusive effect than a simple contract. The question here is, not whether the particular evidence here adduced was or was not before the naturalizing court, but was the fact which this evidence is intended to prove or disprove before that court. The proofs in this case do not raise the question of fraud or collusion in the naturalization proceedings, but simply the question of fact as to the requisite length of residence of the claimant in the United States, before he was admitted to citizenship. Many authorities may be found (although they are by no means uniform), holding that a judgment may be impeached for fraud or collusion; but the court has not been referred to a single case, neither can one be found, in which it has been held that a judgment may be impeached for any matter which was necessarily before the court and involved in the decision, as the fact of residence was in the case under consideration. On the contrary, the authorities are uniform, that a judgment cannot be impeached for any such matter.

The distinction between cases in which judgments may and those in which they may not be impeached collaterally, as derived from the authorities, and founded in common sense, may be stated thus: They may be impeached by facts involving fraud or collusion, but which were not before the court or involved in the issue or matter upon which the judgment was rendered. They may not be impeached for any facts, whether involving fraud or collusion or not, or even perjury, which were necessarily before the court and passed upon.

See *McCarthy v. Marsh*, 5 *N. Y.* 284; *Mason v. Messenger*, 17 *Iowa*, 261, 272; *White v. Merrit*, 7 *N. Y.* 352, 355; *Sidensparker v. Sidensparker*, 52 *Me.* 481, 489;

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Parkhurst v. Sumner, 23 *Vt.* 538; Lewis v. Rogers, 16 *Pa.* 18, 21; Warburton v. Aken, 1 *McLean*, 460; Demeritt v. Lyford, 7 *Fost. (N. H.)* 541, 546-549; Dilling v. Murray, 6 *Ind.* 324; Peck v. Woodbridge, 3 *Day*, 30, 36; Homer v. Fish, 1 *Pick.* 435, 439-441; Smith v. Lewis, 3 *Johns.* 157, 168; Smith v. Lowry, 1 *Johns. Ch.* 322-324.

It was objected on the argument on behalf the United States, that the record shows that the oath of the applicant was allowed to prove his residence, contrary to the express provision of the naturalization laws, and that the record is therefore a nullity. The record states as follows: "And it appearing to the satisfaction of the court, as well from the oath of the said applicant as from the testimony of Charles Old and Jesse Coe," and then follows a statement of all the prerequisites to naturalization, viz: residence, good moral character, attachment to the principles of the constitution, &c. The oath of the applicant is prohibited by the act only as to his residence. By implication, therefore, such oath may be allowed to prove any of the prerequisites other than that of residence; and this court will, in support of the validity of this record, refer such oath to such prerequisites only as could be lawfully proven by it, and will presume that the finding of the court, as to the residence of the applicant, was based upon the other testimony mentioned in the record, and not upon the oath of the applicant. It is a well-settled rule that when a record, or other writing, admits of two constructions, one of which will give it force and validity, and the other of which will render it a nullity, the court will adopt the former. I hold, therefore, that the objection is not tenable.

It was suggested by the learned counsel for the United States that naturalization proceedings, as usually conducted, are virtually *ex-parte*, and with but little, if any, circumspection or attention on the part of the

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court before which they are had, and that the court is liable to be imposed upon by false testimony and otherwise; and that, therefore, the rule ought to be more liberal in allowing them to be impeached than in the case of ordinary judgments. There is undoubtedly some force in the suggestion, but a little reflection will show that the inconvenience and hardship which would inevitably result to individuals from its adoption, would be vastly greater than the slight inconvenience resulting occasionally to the government by adhering to the strict rule.

The government favors naturalization; and, owing to the liberality of its laws upon that subject, is no doubt liable to occasional imposition; but if every naturalized citizen must always be prepared with his proofs to maintain the grounds upon which he obtained his papers, in all courts and places in which they may be brought in question, the boon of citizenship which is so liberally bestowed would be barely worth possessing.

No proof was adduced to sustain the second article of the libel, other than what has been already considered.

The libel must be dismissed.

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LE ROY v. CHABOLLA.

*Circuit Court, Ninth Circuit ; District of California,  
October T., 1870.*

CONSTRUCTION OF STATUTES.—LAND GRANTS.

Where several statutes upon the same general subject are inconsistent or doubtful in meaning, they should be examined together, and the probable intent of the legislature, as ascertained from the acts in their connexion, and from the attending circumstances, should be carried into effect.

The act of the legislature of California of March 17, 1866,—declaring lands of the city of San Jose “not hitherto disposed of by ordinance,” &c., to be vested in the corporate authorities of the city in trust for the use and benefit of the public schools,—was not intended, and therefore did not operate as a confirmation of the previous sheriff’s sale of lands in that city attempted to be made under the ordinance of November 10, 1851.

Trial of issues by the court.

*J. B. Felton* and *A. J. Moultrie*, for the plaintiffs.

*F. E. Spencer*, for the defendants.

SAWYER, J.—This is an action against some four hundred and fifty defendants, to recover a large portion of the city of San Jose and of the county of Santa Clara. The case is, therefore, one of great importance. The first question presented is, whether section 73 of the act of March 17, 1866,—to “re-incorporate the city of San Jose,”—properly construed, confirms and renders valid the confirmation of sheriff’s sale, and release of the corporation to the purchasers thereunder, of all the

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Pueblo lands attempted to be made by an ordinance of the common council of the city of San Jose, approved November 10, 1851, mentioned in the agreed statement of facts. If not, then, there must be judgment for the defendants; for the plaintiff's title depends upon this provision of the statute.

In order to give a proper construction to this section, it will be necessary to consider the condition of things upon which the act was intended to operate, at the time of its passage. On May 28, 1851, all the Pueblo lands of the city of San Jose, being many leagues in extent, were sold by the sheriff of Santa Clara county in one parcel, and at one bid, under an execution issued upon a judgment against the mayor and common council of the city of San Jose, which municipal corporation had succeeded to the interest of the Pueblo. On June 12, 1851, the mayor of San Jose, assuming to act on behalf of the city, in pursuance of a resolution of the common council, signed a contract with the representatives of the purchasers at said sale, as parties of the first part, under which sales of said land were to be made, and after paying the amount of the judgment, expenses, &c., the proceeds were to be divided in certain designated proportions between the parties and the city; and by the provisions of said contract, the said parties of the second part (the mayor and common council) ratify and confirm the said sheriff's sale, and release to the said purchasers thereunder, the interest of the city of San Jose in said lands. Said ordinance purported to ratify and confirm said contract, and authorized the mayor to sign any deeds or contracts necessary to carry it into effect.

Between the said June 12, 1851, and April 21, 1858, the representatives of said purchasers at sheriff's sale, *and the mayor of said city*, in pursuance of said agreement, ordinance, &c., sold and conveyed to private parties, tracts of said land, in number more than

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fifty, and, in the aggregate, amounting to more than five thousand acres. And between said dates last named, said representatives of the said purchasers *alone* conveyed other tracts of said lands, amounting in the aggregate, also, to more than five thousand acres.

Subsequently, in 1864, it was held by the supreme court of the State, that the said sheriff's sale, contract, ordinance, &c., and the titles derived thereunder, were absolutely void, and that the title of the city of San Jose in the Pueblo lands was in no way affected thereby; the supreme court affirming the judgment of the district court rendered therein early in 1862. But the principles upon which the determination rested had been long before settled by the supreme court in other cases.

On April 21, 1858, the legislature passed an act authorizing the funding of the floating debt of the city of San Jose, and to provide for the payment thereof. By section 10 of this act, the board of trustees of the city of San Jose were required to convey to the commissioners of the funded debt, provided for in the act, all the lands, and right in and claim to the same, held or owned by the former Pueblo de San Jose, to be held in trust for the payment of said debts, and authorized them to sell and convey the same for said purposes, in such manner as they should deem the interests of the city to require.

In pursuance, of this act, on August 4, 1858, the city, by its proper officers, conveyed all said Pueblo lands to said commissioners. The said commissioners of the funded debt, between the last named date and January 17, 1866, in pursuance of the provisions of said act, executed and delivered more than four hundred deeds to private individuals in severalty, of lots within and lands without the city limits, amounting in the aggregate to more than twenty-five thousand acres

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of said Pueblo lands ; and their vendees went into possession thereof. So, also, at divers times between March 27, 1850, and said April 21, 1858, the mayor and common council of San Jose, by ordinances and deeds of conveyance, conveyed in fee to various individuals small lots and tracts of said lands, to the number of more than fifty, and amounting in the aggregate to more than fifteen hundred acres of land.

On January 17, 1866, all the debts of said city existing on April 21, 1858, had been paid off by said commissioners, and, on that day, the legislature passed an act reciting said fact of payment, and abolishing said commission. Said act provided, that said commissioners should re-convey to the mayor and common council of San Jose, all said Pueblo lands not already sold to private parties by said commissioners, and then authorized the mayor, in such manner as the common council should direct, to sell and dispose of all said lands, and invest the proceeds in certain bonds mentioned, for the benefit of the public school fund of said city. In pursuance of the provisions of said act, said commissioners did, on January 26, 1866, re-convey to said mayor and common council of San Jose, all of said Pueblo lands before conveyed to them as before stated, not sold by them to private parties ; and at the time of said re-conveyance, there remained of said lands, which had not been sold or otherwise conveyed, or disposed of, by said commissioners, more than thirty thousand acres.

This being the condition of affairs on March 17, 1866, on that day the legislature passed the said act to re-incorporate the city of San Jose, section 73 of which is the one to be construed. It provides that "All lots known as the school lots, and all lots and lands, either within or without the corporate limits of the city of San Jose, dedicated and belonging to said city, not hitherto disposed of by ordinance, or sold, and by deed trans-

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ferred to individual purchasers, either by the common council or by those acting as commissioners of the funded debt of said city (and which sales and transfers are hereby declared valid), are hereby fully vested in the mayor and common council of said city, *in trust for the use and benefit of the public schools of the city of San Jose*; and the mayor and common council are hereby authorized to sell, transfer, or exchange the same for other lots and lands, if in their opinion the interests of the public schools will be best secured by so doing, and all money received from such sales shall not be diverted from the school fund of said city." *Stat. 1865-6*, p. 268, § 73.

This provision, and the several other acts of the legislature referred to, relating to the Pueblo lands, are *in pari materia*, and should be read together in order to get at the intention, if the construction of the latter provisions can be regarded as doubtful. Did the legislature mean by the terms, "not heretofore disposed of by ordinance," to include the said ordinance of November, 1851, by which the sheriff's sale was attempted to be confirmed? If so, then, they might have said so in terms about which there could be no doubt, and have stopped there, for there would have been nothing more to say. There would have been no other lands for the statute to operate upon, and all other provisions would have been useless. If it was intended to make the disposition attempted by that old ordinance valid, it took all the Pueblo lands, and went behind all their subsequent sales and transfers. The truth is, that all the legislation on the subject of the Pueblo lands had, therefore, gone upon the assumption, that those transactions in 1851 were utterly void, as they in fact were, and have been so held by the highest court of the State. The legislature of 1858, which passed the Funding Act, acted upon that hypothesis. It wholly ignored the existence of those early void acts, and pro-

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ceeded upon the idea that the Pueblo lands were still owned by the city of San Jose. When it established the fund commission, and provided for funding the debt of the city existing prior to April 21, 1858, it set apart all these Pueblo lands as a fund for securing the payment of said debt, and provided that the city authorities should convey the lands to the fund commissioners for that purpose, and authorized and required said commissioners to sell them for the purposes of the trust. And the commissioners did proceed to execute this trust, and so managed the affairs under the law that, in the course of eight years, during which time they had sold more than twenty-five thousand acres of the same lands to private parties, who settled on and occupied them, they paid off the entire debt, and the object of their trust was fully accomplished.

The legislature, in January, 1866, again legislated upon the subject, wholly ignoring the transactions of 1851, and in an act reciting the full performance by the commissioners, of their trust, abolished the fund commission, for which there was no further use, and directed the commissioners to re-convey the Pueblo lands yet unsold, of which there were more than thirty thousand acres left, to the city of San Jose, and provided that the mayor should sell them, &c., and invest the proceeds in certain bonds for the use of its public schools. It deals with these lands in all respects as if they still belonged to the city. Again, the legislature deals with the subject, as it necessarily must do, in the act under consideration to re-incorporate the city. It is the same legislature that passed the act of January 17, 1866, and it was at the same session. They do not return to this subject as a special subject of legislation, but they necessarily have to deal with it as incidental to another act of legislation. Do they indicate any change of purpose? None at all; for in sec-

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tion 73, they still provide that all lands—and there are none other—are hereby fully vested in the mayor and common council of said city in trust for the use and benefit of the *public schools of the city of San Jose*”—the same as provided in the act passed at the same session, some two months before. It was not its purpose, then, to take them from the public schools, and give them to parties who set up a void claim to them, which arose some sixteen years before. If the construction claimed for the provision is to be sustained, this plain intention would be wholly subverted, and by far the largest portion of the provision would have nothing upon which to operate. Whereas, by reading the section in connection with the prior acts, and the proceedings under them, and considering it in connection with the intention before expressed, and the condition of things existing at the time, every word can have effect, and such effect will be in exact harmony with the prior action of the legislature. It was, in my judgment, only intended to carry out to its results the policy before adopted, and to validate such acts as might be thought to have been irregularly performed in carrying out that policy, and to confirm such disposition as the mayor and common council had made by ordinances and conveyances in the ordinary course of the administration of the city affairs in harmony with the legislative policy before adopted. I cannot think it was designed to subvert its prior policy, or to vivify an old, void, extraordinary, and probably long-forgotten claim, so out of harmony with all prior legislation, and the other provisions of the same act. The legislature could not have intended to take from the public schools of San Jose, to the use of which they had already been solemnly dedicated by an act recently passed by the same body, all the Pueblo lands, or all that remained of them, and donate them to the claimants under the purchases at the sheriff's sale of 1851,

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and at the same time continue to devote them to the use of said schools. It was necessarily intended that one or the other should have them; for both cannot have them at the same time. That construction, then, must be adopted, which is most clearly expressed, and the other rejected. To my mind, it is clearly manifest, from the full and particular language used, that the design was to devote the lands to the public schools, as had been before provided. The other view, then, cannot express the true legislative intent, and to adopt it, would be to give effect to general, loose, and obscure terms, rather than to those that are full, clear, and unmistakably explicit. A construction of the section that would validate the title originating in the sheriff's sale of 1851, would, in my judgment, lead to inconsistent, not to say absolutely absurd results. It is worthy of observation, that this is not the first instance in the legislature of the State of California, wherein a loose, parenthetic grant, or confirmation of grants of lands, carelessly or covertly, as the case may be, introduced into acts passed for other purposes, has given rise to uncertainty and litigation.

Upon the view taken, the plaintiff has no title, and it is unnecessary to examine the other questions discussed.

The lands so conveyed to the city of San Jose by said commissioners, have, since the reconveyance, and before the commencement of this suit, been conveyed in small parcels by the mayor and common council of said city, to divers private parties, in pursuance of said act of March 17, 1866, and many of the defendants hold under said conveyances.

Let judgment be entered for defendants, with costs of suit.

Judgment accordingly.

## UNITED STATES v. SOUDERS.

*District Court; District of New Jersey, April T., 1871.*

## CRIMINAL LAW.—PREVENTING SUFFRAGE.

On indictment, under section 19 of the act to enforce the right of citizens to vote, &c., approved May 31, 1870, 16 *Stat. at L.* 144, for "unlawfully preventing certain qualified voters from freely exercising the right of suffrage;" where the proof was, that the defendant, with others, attacked a number of voters, waiting in line for their turn to cast their ballots, and expelled them from the room; and that said voters afterwards returned and voted;—

*Held*, 1. That the defendant committed the offense which Congress meant to define and punish in the clause of the section under which the indictment was drawn.

2. That the prevention took place, and the offense was complete, by the expulsion of the voters from the polls, although the prosecutors afterwards voted.

The words "exercising the right of suffrage" in section 19 of the act of May 31, 1870, may be held to mean "voting," without bringing that section in conflict with the provisions of section 4 of the act,—provided that the penalties prescribed in section 19 be understood to apply to offenses committed at elections for members of Congress, and those in section 4 to State, county, and municipal elections.

*Query*, whether under the fifteenth amendment to the Constitution of the United States, Congress has power to pass any law to operate upon private individuals?

A copy of a return of an election in a township, filed with the clerk of the county, accompanied by the certificate of the clerk of the county, that it was a full and correct return of such election, as filed in his office,—sent to the office of the secretary of state, is not made and certified in the manner, and does not come from the source required by the election law of New Jersey, to constitute it an official paper.

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United States v. Souders.

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Motion for new trial, after conviction on an indictment.

*A. Browning* and *B. Williamson*, for the motion.

*A. Q. Keasbey*, district-attorney, in opposition.

NIXON, J.—The defendant in this case has been indicted, and upon trial convicted, of “unlawfully preventing certain legal voters from freely exercising the right of suffrage” at an election for a member of Congress, held on the eighth day of November last, in the township of Newton and county of Camden. The indictment was framed under section 19 of the act, entitled “An Act to enforce the right of citizens of the United States to vote in the several States and for other purposes,” approved May 31, 1870.

It may be assumed, in view of the verdict of the jury, that the government proved, at the trial, that on that day,—fixed by law for the election of a representative in Congress, and the several State and county officers,—the polls were regularly opened at seven o'clock, A. M. ; that the election was conducted by certain officers, claiming to act under the authority of the township ; that during the progress of the election, at about half-past ten o'clock in the morning, whilst the room in which the election was held was well filled with colored voters, waiting for the opportunity of casting their ballots, a violent attack was made upon them by a company of white men, driving them forcibly from the room into the street, and closing, or attempting to close the door against them ; that amongst the legal voters thus rejected, were John Ray, Henry W. Sizer, Lorenzo Wilson, Wm. H. Newsome, and Moses Wilcox ; that these men, with others driven out, almost immediately rallied, and with the aid of their friends, regained admittance to the room, and, in turn, drove out the white

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men ; and that all of them subsequently voted. The jury has also found, as a question of fact, that the defendant, Francis Souders, was engaged in this outrage of expelling the colored voters from the room, and thus preventing them from freely exercising the right of suffrage.

It further appears, that after the morning disturbance was quelled, the voting was resumed and continued without any serious interruption, until about six o'clock in the afternoon ; that eight hundred and sixteen ballots were deposited ; and that then another crowd of white men took possession of the polls, seized the ballot box, broke it in pieces, and scattered the ballots upon the floor and in the street.

Upon submitting this case to the jury, at the trial, I reserved two legal questions for consideration afterwards,—more in deference to the strongly expressed convictions of the able counsel for the defense, than because I entertained any serious doubt as to their correct import and meaning. Since then I have examined the briefs submitted by the counsel for the government and of the defendant, elaborately discussing these questions, and have given to them that careful attention which their importance, as bearing upon the conviction of the defendant, seemed to require.

The first question involves the true construction of the clause of section 19 of the act entitled “An Act to enforce the right of citizens of the United States to vote in the several States of this Union, and for other purposes,” under which the indictment against this defendant was drawn ; and the second, the legal effect upon this case of the certificate of election, filed in the office of the secretary of state, by certain persons, claiming to make the return of the election in the township of Newton, in the county of Camden, on November 8, 1870.

I. The charge against the defendant in substance is,

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that at an election for a representative in the Congress of the United States, held as aforesaid, he unlawfully prevented certain qualified voters from freely exercising the right of suffrage, by force, threats, menaces, and intimidation. The proof is, that at said election, the defendant, in company with others, in the room where the polls were opened, made an attack upon a line of voters, waiting for the opportunity of casting their ballots for a member of Congress, and drove them from the room with violence, under the pretext that certain other voters not in the line were excluded from the polls, and attempted to fasten the doors against their re-admission.

It is insisted, on the part of the defendant, that this is not the offense which Congress meant to define in the clause of section 19, under which the indictment was framed ; that preventing a voter from freely exercising the right of suffrage is not preventing him from voting ; that the one is a mental restraint, and the other a direct physical interference ; and that the design of Congress, in using these words in this section, was to protect men in voting as they wished to vote, rather than to secure to them the opportunity of voting. It is further maintained, that, even if it be conceded that one of the meanings of the expression, "preventing a voter from freely exercising the right of suffrage," is "preventing him from voting;" yet the facts of the case do not prove a prevention, but a hindrance ; that to prevent, is altogether to deprive him of the opportunity to vote, while to hinder is only to delay him temporarily in the exercise of the privilege ; and that, as all the prosecutors afterwards voted, the offense defined in section 19 of the statute was not committed.

The argument is, that in the first place, the proper definition of the words used will not admit of the construction claimed by the government ; and that, in the next place, all the sections of the statute must be so

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construed, as to render them operative, consistent, and harmonious with each other; that the construction given to section 19 by the government brings it in direct conflict with the provisions of section 4 of the act; that one penalty is described in section 4 for "preventing, hindering, or obstructing a qualified voter in voting;" and that a different and more severe penalty is affixed in section 19, for "unlawfully preventing him from freely exercising the right of suffrage;" and hence, that it is necessary to assume, in order to harmonize the provisions of these two sections, that different offenses were in the mind of Congress when the law, as a whole, was enacted.

1. Our first inquiry will be, whether a proper definition of the words used in the section fairly admits of the meaning insisted upon by the counsel for the government?

There are well settled rules in the construction of statutes. The object of all inquiry is to get at the intention of the legislature in passing the law; and the sole duty of the court is to grant to that intention, when ascertained, its full force and effect. We first consider the language employed, giving to words and sentences their obvious import and signification; having regard more to their general and popular use than to etymological or grammatical refinements. If any doubt remains, we then look at the context; at the subject matter; look to the effects and consequences of this or that interpretation; to the reason and spirit of the law itself; expounding it in the light of the mischief of the old law, or want of law; and the remedy which the legislature has attempted to provide.

Where the statute is penal it must have a strict construction; for the law is tender as to the rights of individuals, and courts wisely shrink from the exercise of the power of punishment, except upon conviction in those cases where the legislature has clearly defined the

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offense and imposed the duty. But we must not err in a too liberal application of the rule. As was well said by Chief Justice MARSHALL, in *United States v. Wiltberger*, 5 *Wheat.* 95, "Though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptance, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest."

Holding these familiar principles in mind, let us consider the clause of the section the meaning of which we are trying to ascertain. The words are, "that if at any election for representative, &c., any person shall by force, threat, menace, intimidation, or otherwise, unlawfully prevent any qualified voter from freely exercising the right of suffrage," &c.

What do these words mean? It would seem that there ought not to be any difficulty in arriving at their signification, if we give to them their obvious and usual import. When a man is spoken of as *exercising* a right, it is commonly understood that he is *doing* something. When a voter casts his ballot into the box, do we not say that he is exercising the right of suffrage? Can any words be used that better define the act of voting? And when he exercises this right freely, does he not do it according to his pleasure, without any constraint either upon his mind or his body? His will must be uncontrolled, and his physical opportunity for

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doing the act must not be interfered with. Any control over the one, or interference with the other, encroaches upon his freedom of action, and produces the mischief which the words of the statute were designed to guard against and cure.

And what is it to *prevent* a voter from exercising this right?

It is to put such a restraint upon his volition, or his body, that he cannot perform the act; producing, by threats or otherwise, such apprehension of personal loss or injury, as to induce him not to vote, or to vote contrary to his wishes, being a restraint upon his will; and intervening between him and the ballot box, so as to render it physically impossible for him to cast his vote, being the restraint upon his body. If this was what the statute forbid, the words used might afford some color for the construction asked for by the counsel for the defendant. But it forbids more than this. It prescribes penalties against those who unlawfully prevent voters from *freely* exercising the right of suffrage. It not only guards the voter against being stopped in the act, but it shields him against all sorts of duress, mental or bodily, while in the performance of the act. Even if it be true that a man is only prevented from voting when he is hindered altogether from exercising the right of suffrage, it is also true that he is prevented from *freely* exercising such right, when, in its exercise, any kind of constraint is placed upon him by force, threat, intimidation, or otherwise.

I am of opinion, therefore, that, looking at the words of the section in their obvious usual signification, and without any reference to the influence and control which other sections of the statute ought to have in the consideration of its construction, the indictment properly describes the offense which Congress meant to define and punish, and the proof of the facts in the case

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sustains all the material allegations of the first and third counts of the indictment.

2. But it is insisted that such a construction of section 19 will bring it in conflict with section 4 ; that if we hold that the identical offense is described in these two sections, we subject Congress to the imputation of passing an act prescribing different penalties in different sections, for the same misdemeanor ; and that it is the duty of the court, under such circumstances, to find some other interpretation of the clause in section 9, which will bring the two into harmony, and cause them both to stand.

The court recognizes this authority and duty when the occasion arises for its exercise, but finds no occasion here. To create this antagonism it is necessary to assume that the phraseology of section 4 is broad enough to include Congressional elections as well as State, county, and municipal. It does not do so in terms ; and I am not willing to assert that if that section stood alone, the language used is not capable of such construction. But it does not stand alone, and it must be construed in connection with other sections of the act ; and if the absurd consequences suggested by the counsel for the defendant are to follow the assumption that section 4, as well as section 19, was designed to apply to Federal elections, is it not more consonant to reason and the principles of right interpretation, that we should limit the provisions of the one to State, county, and municipal elections, and of the other to the election of members of Congress, than to wrest the words from their natural and obvious meaning, in order to create different and distinct offenses ?

And this brings us to the inquiry, what offenses did Congress mean to guard against and punish in these two sections of the act ? I must acknowledge that the question is not free from embarrassment, if we consider the words only which they have used to express

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their object. The whole law indicates a want of precision and harmony in the use of terms that suggests either haste, or the work of more than one mind, in its preparation.

In construing a statute, it is one of the fundamental rules to ascertain the intention of the law maker. Where the words used do not clearly disclose this intention, it is proper to consider what was said or done by the law-making power, while the subject matter was under discussion, in order to arrive at their meaning. Looking carefully into the mischief avowedly intended to be remedied by the law, and into the history of the legislation preceding and accompanying its enactment, can there be any doubt but that its different sections were the work of many minds; that the law gradually grew from a single proposition, including only one object, into a complex one, embracing several; that the first thirteen sections were prepared to enforce the fifteenth amendment; that the next five sections were inserted to more effectually provide for carrying out the fourteenth amendment, and that the nineteenth and subsequent sections were afterwards added to accomplish another object, to wit: to preserve the purity and freedom of elections for members of Congress?

Bills were pending and under discussion at the same time in the senate and house of representatives, with different provisions, but relating to the same subject matter, and having the same end in view. The title of these bills and the provisions of the several sections show that the primary design in each case was simply to provide the appropriate legislation deemed necessary to enforce the fifteenth amendment. The house bill, as passed on May 16 and sent to the senate on the 17th, was confined to this object. When it reached that body the senate bill No. 810, entitled "An Act to enforce the fifteenth amendment of the Constitution" was under discussion. This, substantially, consisted of

the first thirteen sections of the law, as subsequently passed, and a motion had just been made to enlarge the purposes of the bill by adding to it two other bills, then pending in the senate, to enforce the fourteenth amendment, and which embraced the sections from the fourteenth to the eighteenth inclusive of the present law. The senate amended the house bill by striking out all after the enacting clause, and substituting their original bill with the proposed amendments; and after a few days' discussion the object and scope of the act were still further enlarged by annexing the 19th and 20th sections, for the expressed purpose of punishing frauds committed in the election of members of Congress. These subsequent sections had been embodied in house bill No. 477, entitled "An Act to prevent and punish election frauds," and which had been reported to the house from the committee on elections, and was then pending before that body as an entirely distinct measure. The bill thus amended passed the senate, and the remaining sections were added to it by the committee of conference on the disagreeing votes of the two houses.

Not much homogeneity of language or expression should be looked for in an act thus made up, and little force can be given to the argument, that because different words and forms of expression have been used in different sections, it should be assumed that there was a design in the mind of the law-making power to express and define different offenses.

This reference to the origin of the law reveals the fact that the manifest object, in section 14, was to enforce the provisions of article 15 of the amendment to the Constitution, and in section 19 to conserve the freedom and purity of elections for members of the house of representatives.

In legislating to enforce the provisions of the fifteenth amendment, it was conceded that Congress might prescribe penalties against national or State officers,

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for interfering with the free exercise of the right of suffrage, and against all persons claiming to act under color of some State law or constitution ; and the question at once arose, whether the constitutional power existed in Congress to pass any law which acted upon private individuals. That amendment, it was alleged, related only to acts done by the United States or any State, to abridge or deny the right to vote on account of race, color, or previous condition of servitude. It had no reference to individuals acting as such, except so far as they pretended to be acting under the authority of existing law, State or national. It is not necessary for me to express any opinion upon that question here and now ; but I allude to it in order to say that, in the debate upon section 4, it seemed to be admitted, both by the friends and opponents of the measure, that no indictment could be sustained under that section, against any one, unless the prevention of voting, or the denial of the right to vote, was done under the color or pretense of some State law or regulation. The act was amended by adding sections 19 and 20, expressly to cover the case of private individuals, who were corrupting the fountain of political life and social order by fraud, bribery, intimidation, force, or other unlawful means, and, anticipating the objection raised by others against the powers of Congress to legislate in the matter of State elections, these sections were limited to offenses committed at an election for members of Congress.

I am, therefore, of opinion that the words "unlawfully preventing a voter from freely exercising the right of suffrage," may be construed to mean "to unlawfully prevent him from voting," without bringing section 19 in conflict with section 4, and that it is not necessary to find some other interpretation, to harmonize the provisions of these sections of the act.

It is further insisted, that to constitute the offense

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created by the clause of section 19 under consideration, the voter must be altogether frustrated in his efforts to cast his ballot ; that the whole day is covered, so far as the meaning of the word prevention is concerned ; and that, as these prosecutors found the opportunity to vote after their ejection, although for a time hindered, the offense was not committed.

It seem to me, as I have already intimated, that such a construction of the statute is too narrow, and that it defeats the purpose which Congress had in view in enacting it. This purpose was to protect men in the discharge of their most sacred political privilege. That would be a slight protection, indeed, which allows bullies and rowdies to surround the ballot box from the opening to the close of the polls, keeping off all legal voters by threats, intimidation, or force ; and then to hold that the offense is not committed, if by chance the hindered voters should avail themselves of a casual opportunity to slip in their ballots when the backs of these vigilant sentinels were turned. And yet this result follows the interpretation asked for.

But the argument here, of the counsel of the defendant, loses all its force when we call to mind that "exercising the right of suffrage," in the statute, is qualified by the word "freely," which, in his reasoning, he seems to have overlooked.

The proposition is, that we shall not prevent a voter from freely exercising the right of suffrage.

It may be admitted that prevention, in its strict signification, includes more than hindrance, and that it involves the idea of total exclusion from the right of voting. But is no force to be given to the word "freely?"

In view of the fact that these five men afterward voted, the counsel for the defendant asked whether they could truthfully answer "yes" to the inquiry, "Were you prevented from voting on the 8th of No-

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vember last?" and insisted that their correct response would be, "No; we were hindered—not prevented."

But suppose the inquiry had been, "Were you prevented from freely exercising the right of suffrage?" they would answer, "Yes, we were hindered from voting by being knocked down, shot, forced out of doors, and having the doors closed against us. We were prevented from voting *freely*. We voted under great difficulties."

It is hardly necessary to multiply words upon this point. It is in proof that these five men stood waiting in line before the ballot box with ballots in their hands, intending to vote for certain individuals upon a certain ticket, which they wished to deposit; that while thus standing prepared to exercise and intent upon exercising their right of suffrage, Francis Souder, with others, drove them from the room and shut the doors against them. How can it be said that they were not prevented from exercising their right *freely*?

II. The only remaining question which we have to consider, is the legal effect upon this case of a paper produced by the government from the office of the secretary of state, and purporting to be a certificate of election filed by certain persons claiming to make the return of the election held in the township of Newton on November 8, last.

The reasoning of the counsel for the defendant upon this point, as it appears to the court, is founded upon a misapprehension of the allegations of the indictment.

The argument is, that the indictment charges that the offense was committed at an election held in the township of Newton, on November 8 last, by Alexander B. Mahan, Samuel P. Atkinson, and Herman Klusterman, judges: that the statute requires the judges holding the election to file a certificate of the

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results, in the office of the secretary of state, certifying the number of votes polled and received by each candidate, and the names of the persons voted for, and that such paper shall be an official paper; that to sustain the allegation in the indictment, the prosecution produced this certificate, which is in fact signed by other parties, and therefore does not prove, but directly contradicts the allegation.

The reply we have to make to the argument is, that there is no such allegation in the indictment, nor was any such material or proper.

The charge was, that a stated election for a representative in the Congress of the United States, and for certain State officers, was duly held on that day at the township of Newton, in the county of Camden.

The facts, therefore, to be proved were, not that Alexander B. Mahan, Samuel P. Atkinson, and Herman Klusterman, were the judges who conducted the election,—but that a stated election was then and there held; that it was conducted by persons claiming to act under the authority of public law, and that it was held for the purpose of electing a member of Congress.

And were not these facts proven? A large number of witnesses testified to them. No one raised a doubt by questioning them. The defense fully showed them by producing the poll book required to be kept by section 40 of the State election law (*Nix. Dig.* 263), having the proper heading, and containing a record of the names of the persons whose votes were received, and the order of their reception, and offering the clerk and two of the judges of election as witnesses, by whom the facts of election and the correctness of the poll book were established.

But it seems to be admitted that these material facts were proved. It is insisted, however, that a copy of a certificate was produced from the office of the secretary of state, which is invested by the statute with the char-

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acter of an official paper, and which contradicted, and therefore invalidated or nullified the verbal proof.

There are short and conclusive answers to this :

1. The paper thus produced was not made or certified in the manner, and did not come from the source required by the statute to constitute it an official paper. It appears, upon inspection, to have been the copy of a return filed with the clerk of the county of Camden, with the certificate of that clerk appended that it was a full and correct return of the election in the township of Newton, as filed in his office. It did not come to the secretary of state, either from the board of election of the township, or from the board of county canvassers.

2. But admit that it has the prerequisites necessary to make it an official paper. Then it is a record, or it is not. If a record, and incapable of contradiction by verbal evidence, as claimed by defendant's counsel, all the facts which it contains must be accepted as true. It shows that there was an election in the township of Newton, in the county of Camden, on November 8 last, and that such election was for a representative in the Congress of the United States, which are the material facts to be established ; and all the verbal testimony in the cause, to the effect that some other judges held the election, must be regarded as untrue ; exhibiting the depravity of the character of the witnesses, or the fallibility of their memory. But if it is not a record, and may be contradicted by other proof, then the verbal evidence offered is abundant to prove these necessary facts in the case, and the verdict was right.

Thus, after a careful survey of the law and the evidence, the court finds no sufficient reason to be dissatisfied with the result at which a patient and intelligent jury arrived, and the motion for a new trial is denied.

Motion denied.

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Hoover v. Reilly.

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## HOOVER v. REILLY.

*Circuit Court, Sixth Circuit ; Eastern District of  
Michigan, June T., 1870.*

## MISTAKE.—REFORMATION OF AGREEMENT.

Where an agreement between two parties was reduced to writing, and read over and signed by the complainant, it is not sufficient in a suit in equity for the reformation of such agreement, for the complainant to allege that he supposed the terms of the written agreement were, in legal effect, the same as the true terms of the agreement previously entered into by the parties. Such a mistake is one of law, and not of fact ; and will not warrant the interference of a court of equity.

What evidence is sufficient to warrant the granting of relief by a court of equity in a suit to reform a written agreement, on the ground of mistake,—explained.

Hearing in equity, upon pleadings and proofs.

The bill in this case was filed to reform a written contract.

On November 13, 1865, complainants purchased of defendant Reilly an undivided one-fourth interest in a patent right for an improvement in harvesting machines, for five thousand dollars, as follows : Two thousand dollars, cash ; five hundred dollars, note due March 1, 1866 ; and twenty-five hundred dollars, note due January 1, 1867. A written agreement was also entered into between the parties, in which, after reciting the terms of purchase as above set forth, it was provided as follows : "It is expressly understood and agreed, by and between both parties, that in case the validity of the claims, as set forth in the re-issued

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patent granted to the said John Reilly, should be declared null and void by the supreme court of the United States, and the protection thereon granted become worthless, then the said D. H. Hoover & Son" (the complainants), "shall be released from all responsibility of paying the last-mentioned note of twenty-five hundred dollars, and it shall be null and void."

The bill alleged that this instrument was erroneous, and did not contain the true terms, nor all the terms of the agreement as actually entered into by the parties, in this:

1. Instead of the note remaining good and payable, in case the letters patent should not be declared invalid by the supreme court of the United States, as provided in effect by said agreement, the real agreement and contract was, that the said note was not to be paid until a competent court should declare, by judgment or decree, that the said patent was valid.

2. That the said instrument omits entirely to state that the said Reilly was to commence a suit immediately, for the purpose of testing the validity of the said letters patent, as was really and in fact agreed upon.

The bill further alleged that the defendant Reilly drew up the said agreement, and that in doing so, he "fraudulently" made the alteration and omission above mentioned, and that complainants signed it "under a mistake, they believing when they signed such paper that it contained all the conditions," &c. ; "that complainants are unlearned in the law, and that when they read said paper, as drawn by said Reilly, they believed the clause inserted therein making said note void, in case the patent was declared null and void by the supreme court of the United States, to be, in effect, what had been previously agreed upon between the parties," &c.

The bill further alleged that suit had been com-

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menced on the note mentioned in the agreement in the name of the defendant Reilly, for the benefit of the defendant Moore; that the defendant Reilly had not commenced suit to test the validity of his patent, and no judgment or decree of any court had been obtained declaring the same to be valid; and prayed that said written agreement might be reformed in accordance with the real intention of the parties, as set up and claimed in the bill, and for an injunction restraining the further prosecution of the suit upon the note.

The bill did not call for an answer on oath, neither did it expressly waive an answer being put in on oath. The answer, however, was on oath, and it expressly denied all the material allegations in the bill as to there being any omissions or errors in the said written agreement; and alleged that said instrument set forth correctly the agreement, and the whole thereof, as it was concluded between the parties; that the complainants had not by their bill made a case requiring the interposition of the court, and defendants prayed the same benefit of this defense as if they had demurred, &c.

A replication was put in and proofs were taken; on which the cause was now heard.

*Mr. Fisher and Mr. Oliver*, for complainants.

*Moore & Griffin*, for defendants.

LONGYEAR, J.—The case made by the bill is, not that complainants were mistaken as to the words or language of the written agreement, but that they misapprehended its legal effect. They concede that they read it, and allege in express terms that they believed a certain specified clause to be in effect, what they allege the real agreement was. There can be, therefore, and is no pretense that there was any mistake of fact in the case. It was purely a mistake of law. The bill

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does not allege that the belief so entertained by complainants as to the legal effect of the language used, was induced or brought about by any device, statements, representations, or expression of opinion of the defendant Reilly. True, it is alleged that Reilly "fraudulently omitted," &c., and that certain provisions were "fraudulently omitted by said Reilly from said paper," &c. But these allegations relate exclusively to Reilly's acts in drawing the paper, and not in any manner to anything he did or said afterwards or at any time to induce in the minds of complainants the erroneous belief which they say they entertained. Neither can it be seriously contended that those are sufficient allegations of fraud upon which to base a prayer for a court of equity to exercise the high powers here invoked. The mere writing of the agreement different from what it was intended to be would be a mistake, an error, but not necessarily a fraud ; and yet from aught that appears in the bill, this is all there was of it. There is no allegation of any concealment or misrepresentation as to the language used, but on the contrary the complainants had it in their possession, perused it, and, without any undue influence, concealment, surprise, or imposition whatever, formed a deliberate opinion as to its legal effect, and were satisfied with it.

The complainants then, by their bill, seek to have the written agreement reformed solely on the ground that, knowing what it contained and all its provisions, they signed it under a mistaken belief as to its legal effect. The case might perhaps appear more plausible if the language used were uncertain or ambiguous in its meaning, or of doubtful construction. But such is not the case. It is plain and explicit, and such that any person of even less than ordinary intelligence, although not learned in the law, could not fail to comprehend.

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Although there are some decisions which would seem to be to the contrary, yet the law is well settled that agreements made and acts done under a mistake of law, stripped of all other circumstances, without any admixture of other ingredients going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that kind of surprise which equity uniformly regards as a just foundation for relief, are held valid and obligatory. *Adams Eq.* 189-191 ; 1 *Story Eq.* §§ 16, 120, 151 ; *Lyman v. Richmond*, 2 *Johns. Ch.* 51, 60.

The case at bar comes clearly within the law as above stated, and, as made by the bill, is not such as to entitle the complainants to the relief prayed for.

If, however, we pass beyond this aspect of the case, and look into it as a question of fact, the result must be the same. The case in this aspect, no doubt, comes clearly within a well recognized branch of equity jurisdiction ; but before the court can be asked to decree an agreement to exist between parties different from that which they have put in writing, a mistake in the written instrument must be clearly made out by proofs entirely satisfactory. "But," says Mr. STORY, "if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief ; upon the ground, that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy." Mr. STORY further says of this rule, "it forbids relief whenever the evidence is loose, equivocal, or contradictory, or it is in its texture open to doubt or to opposing presumptions." 1 *Story Eq.* §§ 152-157 ; citing numerous cases, English and American ; see particularly, *Gillespie v. Moon*, 2 *Johns. Ch.* 585-597 ; *Lyman v. United Ins. Co.*, *Id.* 630-24.

Apply this well established rule to the present case, and how does it stand ? The mistake alleged in the

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bill, or any mistake whatever in the written instrument, is expressly denied by the answer. The bill does not expressly call for an answer on oath ; neither does it expressly waive an answer on oath ; it is entirely silent upon that subject. This was, of course, a defect in the frame of the bill, but the defendants having waived the defect and submitted to answer, their answer must be on oath, the same as though it had been so expressed in the bill, because, by rule 105 an answer on oath is not waived unless it is so expressed in the bill. By well known rules of equity pleading and evidence, the answer being strictly responsive to the bill in regard to the alleged omissions and errors in the written agreement, is evidence for the defendants, and can be overcome only by a clear and undoubted preponderance of proof.

The complainants and the defendant, Reilly, were sworn as witnesses. Upon a full and careful perusal of their testimony, I can see nothing in it to change the aspect of the case, as it was left by the pleadings. It is equally contradictory, and of no greater force or effect than the pleadings.

There were but two other witnesses who testified in the case ; Mr. Eminger, on the part of complainants, and Mr. Robinson, on the part of defendants. Each of these witnesses testifies, that he was present and heard all that transpired between the parties ; and the testimony of each is almost, if not quite, as directly in conflict with that of the other, as the testimony of the parties to the suit. The testimony of Robinson is, however, much the more pointed, specific, and satisfactory.

Eminger testifies upon the main point in controversy, as follows : " For the balance, a note was to be given, payable January 1, 1867, providing Mr. Reilly sustained his claims before a competent court. Afterwards, but before the contract was signed, he repeatedly asserted that the Messrs. Hoover should not pay said note unless his claim was sustained by the court."

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"After the papers were signed, Mr. Reilly again said, that the Messrs. Hoover should have no uneasiness concerning the last note, that he would never ask them to pay a dollar on it unless his claim should be sustained in court." And in a conversation witness had with Reilly after the contract was signed, he said, "You see I don't want anything but what is fair from the Messrs. Hoover, and that unless I make my claims good, I shall never ask them to pay a cent on the note." Thus far we are left entirely to inference, as to whether an adjudication was to be brought about by a suit to be instituted by one party or the other, and if so, by which party; or, whether it was left contingent upon a suit to be commenced by some other party. But inference is not sufficient ground upon which to do away with or reform a written agreement. As we have seen, the proof must be clear and positive. But this witness gives us a little more light upon the subject. He says, "Mr. Reilly did say that he wanted money to prosecute parties who were infringing upon his patent, meaning Mr. Seiberling, and that he would immediately, as soon as he got matters arranged at home, notify the parties, *and if they did not agree to pay him royalty*, he was to prosecute them in the highest courts, and thereby test the validity of his patent. It was also the understanding, that the *contemplated suits* should be or were a part of the contract, and that unless he made his claim valid, he would never ask the Messrs. Hoover to pay the last note of \$2,500."

What "contemplated suits" are here referred to? Of course, those mentioned just before, that is, suits to be commenced by Reilly, *in the contingency* that parties infringing his patent, on being notified, did not agree to pay him royalty. As to what was to be done in regard to commencing suits in case such parties did agree to pay him a royalty, we are left entirely in the dark. The only inference we can draw from this testi-

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mony is, that if parties so infringing did agree to pay royalty, then no suits were to be commenced. And this is really the common sense of the thing after all. Let this be inserted in the contract just as testified to by this witness, in lieu of the provision as it now stands, and it would make no material change in the legal effect of the agreement as a whole.

The testimony of Robinson is much more explicit and satisfactory, and it contradicts Eminger in every important particular ; and as he stands before the court on an equal footing with Eminger, as to credibility, his testimony at least neutralizes that of Eminger ; and it may be further said, that, being in conformity with the written agreement, it is for that reason of greater weight than that of Eminger, which is in opposition to it.

The proofs therefore, do not bring the case within the rule of law above stated, under which relief may be granted in such cases, and for that reason, as well as for the reason before stated, that the bill does not state such a case as equity will relieve against, the bill must be dismissed, with costs to the defendants.

Let a decree be entered accordingly.

NOTE.—During the same term of the court, Judge LONGYEAR delivered an opinion in the case of *WATERMAN v. MERRILL*, upon a motion to amend the answer to a bill in equity ; in a case turning upon allegations of mistake.

After stating the facts, and the rules of the court, relating to pleadings, the opinion proceeds :

“It will be observed that the proposition to amend is based exclusively upon the ground of mistake in points of law. Notwithstanding some dicta of the courts to the contrary, the rule seems to be well settled that amendments will not generally be permitted to be made where the application is based solely on the ground that the defendant, at the time he put in his answer, was acting under a mistake in point of law ; and not on the ground of a fact having been incorrectly stated. Mr. BARBOUR (1 *Ch. Prac.* 164), goes so far as to say ‘the court has never permitted amendments to be made’ under such circumstances ; and Mr. STORY (*Eq. Pl.* § 897), says, ‘A distinction has

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also been made between the admission of a fact and the admission of a consequence in law or in equity.' I will not go so far, however, as to hold, that in no case would an amendment be allowed to be made in the admission of a legal or equitable consequence. Take a case of newly discovered facts, or of a mistake in the facts, in which such facts or such mistake would change the entire legal and equitable aspects of the case. Upon an amendment being allowed to the answer setting up such new facts, or correcting such mistake, the court would no doubt at the same time allow an amendment as to the admission of such legal and equitable consequences. But in the case at bar, without asking to have a single fact in the bill changed, or a single new fact alleged, the court is asked for leave to change the theory of defense set up and admitted by the original answer, in several important particulars. I do not think a case can be found in which this has been allowed to be done."

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THE SOUTH FORK CANAL COMPANY v.  
GORDON

*Circuit Court, Ninth Circuit; District of California,  
October T., 1868.*

REVERSAL OF JUDGMENT.—RIGHTS OF PURCHASER.

The mandate of the supreme court, upon a writ of error or appeal, must be promptly and implicitly enforced by the court below, except so far as the enforcement may be modified or restrained by events occurring subsequent to the period covered by the record in the supreme court.

Such events may often modify the manner of enforcing the mandate.

If, pending a writ of error or appeal, no stay of proceedings having been obtained, proceedings are taken to enforce the judgment, and property of the defendant is sold under them, the purchaser acquires a good title.

This rule is not a measure of protection afforded to strangers bidding at judicial sales only, but extends to the parties or their privies. It rests upon the principle that a judgment of a court having jurisdiction is, however erroneous, efficacious until reversed.

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The rule governing the restoration, after reversal, is this: that the party unsuccessful in the court below is to be restored, by reversal, to all things which he lost by the erroneous judgment or decree, if the title to them has not passed by the previous enforcement of the judgment or decree; and if it has, he is, in such case, to have a right of action for a money equivalent.

In an action in the circuit court, brought to foreclose a lien upon a canal for labor and materials furnished in constructing it, the court, having jurisdiction of the parties and the subject matter, passed upon the amount of the indebtedness of the South Fork Canal Company to the complainant; upon the existence of the lien asserted, and its extent, and adjudged that the lien extended to the entire flume and canal; and it decreed the sale of the property in case payment of the complainant's demand was not made by a day designated. The payment was not made, and the sale took place, the master following, in all particulars, the direction of the decree. His report of his proceedings was not excepted to, and was confirmed. The complainant was mentioned in the decree as a possible bidder, and provision made for crediting his bid on the amount adjudged due to him. The master reported that H., the assignee of the complainant, became the purchaser, and when the report was confirmed, the master was directed to execute to him a deed of the property. *Held*, that the purchaser acquired a title to the premises which could not be divested by a reversal, in the supreme court, of the judgment; although such reversal proceeded upon the ground that the lien established by the complainant extended to a portion of the canal only, and that the judgment was erroneous in directing the whole to be sold.

Motion for entry of a decree to carry into effect the mandate of the supreme court upon an appeal.

This suit was in the nature of a bill in equity by George Gordon against the South Fork Canal Company, and others, to enforce a lien, claimed under the statutes of California, for labor and materials furnished by the complainant in the construction of that portion of the company's canal which extended from section seventeen to section twenty-five inclusive; a distance of about nine miles.

On March 16, 1853, the complainant and one Kin-

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yon contracted with the South Fork Canal Company, for the construction of the canal proposed by the company. By the agreement the work was to be completed by July 1, 1853 ; and it was promptly commenced by the contractors. The contract called for monthly estimates and payments. The first installment was paid by the company, but they were unable to pay those which afterwards accrued. By this failure the contractors were rendered unable to pay hands, and were compelled to abandon the work. They thereupon filed a notice, pursuant to a statute of the State of California, claiming a lien upon the canal for the sum of one hundred and six thousand four hundred and eighteen dollars, then due for their labor and materials ; and afterwards filed a similar notice claiming a further lien. To enforce this lien, the present suit was brought, Kinyon having released his right.

The defendants demurred to the bill, as originally filed ; and the demurrer was sustained, for want of proper averments to give jurisdiction. The bill being amended in that respect, a plea was interposed contesting the validity of the lien claimed by the complainant ; and this issue, having been argued before McALLISTER, J., was determined in favor of the complainant. His opinion is reported, 1 *McAll.* 513.

The cause was afterwards brought to hearing upon pleadings and proofs, when an interlocutory decree was rendered at October term, 1864, by which it was adjudged that the demand of the complainant for the work performed and materials furnished in the construction of the canal of the defendants, from section seventeen of the canal to section twenty-five inclusive, under the contract of March 16, 1853, was, to the extent of reasonable value, a lien upon the portion of the canal constructed paramount to all other liens set forth in the pleadings ; and it was referred to a master to take and state an account of the value of such work and ma-

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terials, and to ascertain the amount paid to the complainant, and report the same to the court.

The master was also directed to compute the amount of interest due on the estimated value of the work and materials, from June 13, 1853, to the date of the computation, at the rate of ten per cent. per annum.

In December, 1864, the master made his report; and no exceptions being taken to it by any of the parties, it was confirmed.

The master found the value of the work bestowed and the materials furnished in the construction of the canal, from section seventeen to section twenty-five inclusive, to be seventy-six thousand five hundred and ninety-eight dollars and eighty-nine cents, and the amount paid to the complainant upon the contract to be six thousand two hundred dollars, and he computed the interest due on these sums up to November 30, 1862.

The master also found the value of what he termed preliminary work and materials, that is, for work done and materials furnished in preparation for the construction of the canal; but the circuit court held, on the motion to confirm this report, that no lien could be claimed for these, but it must be limited to work and materials which actually entered into the thing constructed; and it would therefore be allowed only for the amount of seventy-six thousand five hundred and ninety-eight dollars and eighty-nine cents, with interest, deducting the amount paid, as above stated.

Upon the motion to confirm this report, however, the question was urged upon the court, whether the lien to which the complainant was entitled was restricted to those sections of the canal upon which his labor and materials had been particularly bestowed, or whether it extended to the entire work. The following is so much of the opinion of the court as relates to this question:

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FIELD, J. (after reciting previous proceedings and determining the amount for which a lien might be decreed).—The more important question for determination is whether the lien shall be declared to extend upon the entire line of the canal, and be enforced against the whole, or be declared to exist upon the sections actually constructed under the contract, and be enforced only against that portion.

In the interlocutory decree a lien was only declared to exist upon the sections named. Our attention in considering the case had been especially directed to the question of the existence of any lien, and little had been said by counsel on either side as to the extent of the canal upon which the lien, if declared, would attach. Upon the final hearing our attention has been particularly called to this matter, and from the reading of the statute we are satisfied that we erred in limiting the lien to the particular sections named. The canal is to be regarded as an entire thing—as a building is to be regarded to which additions or repairs are made. The lien is obviously not restricted to the wing added, or the chamber or roof repaired, but extends to the whole structure. The statute of April 12, 1850, provides that “All master-builders, mechanics, lumber merchants, and all other persons performing labor or furnishing materials for the construction or repairs of any building or wharf, shall have a lien, separately or jointly, upon the building or buildings or wharf which they may have constructed or repaired, or for which they may have furnished material of any description, to the extent of the labor done, or materials furnished, or both.” *Laws of 1850*, ch. 87, § 1.

And the statute of May 17, 1863, declares that the previous act of 1850 “shall be so extended as to include in its provisions bridges, ditches, flumes, or aqueducts constructed to create hydraulic power or for mining purposes ; and all master-builders, mechanics,

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contractors, journeymen, or laborers, and all other persons performing labor or furnishing materials for or employed in the construction or repair of any bridge, ditch, flume, or aqueduct aforesaid, shall have the same lien, subject to the same provisions and regulations as in and by said act is provided for liens upon buildings and wharves." *Laws of 1853*, ch. 148, § 1.

As will be perceived, by this last act, the lien is given upon the bridge, ditch, flume, or aqueduct,—that is, upon the whole of each work, not upon a part of either,—where labor is performed or materials are furnished for or employed in their construction or repair. It is not essential to create the lien that the labor or materials should cover the entire work ; the lien goes upon the whole for the construction or the repair of any portion.

The statute leaves no room for doubt on the question presented, but determines it in favor of the complainant.

And there is nothing in the adjudication of the interlocutory decree, which prevents the extension of the lien on the final hearing. A court of equity can, at such hearing, or at any time before, enlarge or restrict or otherwise modify the provisions of its interlocutory orders or decrees, either upon the petition of the parties, or upon its own further consideration of the law and the evidence. The whole case is under its control until the final decree is rendered. *Calk v. Stribbing*, 1 *Bibb*. 128 ; *Cook v. Bay*, 4 *How. (Miss.)* 485.

A decree will be entered extending the lien, and directing a sale of the entire canal, and the application of the proceeds to the payment of the demand of the complainant, as stated in this opinion.

From the decree entered in conformity to this opinion the defendants appealed to the supreme court. A bond for costs on appeal was executed ; but no *super-*

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*sedeas* was obtained or asked. Proceedings under it were therefore prosecuted ; a sale was made, and a report thereof confirmed.

The appeal being brought to a hearing in the supreme court, that court, while holding the decree below correct in other respects, adjudged it erroneous in extending the lien of the complainant to the entire canal ; holding that such lien must be restricted to the particular sections constructed by the complainant. It therefore reversed the decree appealed from, and remanded the cause to this court, with directions to enter a decree in conformity with its opinion. The decision is reported, 6 *Wall.* 561. Justices FIELD, GRIER, and MILLER, dissented..

The defendants now apply for the entry of a decree pursuant to this decision.

FIELD, J.—After stating the proceedings in the cause, proceeded as follows :

The defendants have filed the mandate, and now ask not only obedience to its commands, but also that the sale made under the decree reversed be set aside, and the property sold be restored to them. The purchaser at the master's sale and his vendee appear in opposition to the latter application.

Obedience to the mandate of the supreme court will always be rendered by this court. It will be a prompt and implicit obedience ; but we trust it will be, as it should be, an intelligent, not a blind obedience. The judgments of that tribunal are founded upon the records before it, and those judgments will be unhesitatingly enforced, except as their enforcement may be modified or restrained by events occurring subsequent to the period covered by the records. That such events may modify, and often do modify the mode and manner of enforcement, is well known to all members of the profession. The death of the parties, partial satis-

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faction, changes of interest subsequent to judgment, and sales upon the judgment pending the appeal, are instances where this result is frequently produced.

The decree which this court will enter under the mandate of the supreme court will, like the previous decree, adjudge, as the amount due, the sum reported by the master, with interest ; but it will declare that it is a lien only upon that portion of the canal which is embraced between sections 17 and 25 inclusive, which were constructed by the complainant. Whether it will go further, and order the enforcement of such lien by directing a sale of the particular sections, will depend upon the effect of the reversal of the decree upon the previous sale ; and this brings us to the second part of the defendant's motion.

There is some contradiction in the adjudged cases as to the effect of a reversal of a judgment or decree upon rights acquired under it. This contradiction has arisen principally, if not entirely, from not distinguishing between the effect of the reversal upon the rights of the parties with respect to the subject matter in controversy, and its effect upon rights acquired on proceedings taken for its enforcement ; and yet the difference in the operation of the reversal in the two cases is obvious, and need only be stated to be recognized.

For instance, it is adjudged that the defendant is indebted to the plaintiff in a certain sum of money, and that the plaintiff recover the same. Here the operation of the judgment is to determine the fact of indebtedness, as well as to authorize the use of the means provided by law for its collection. The reversal of the judgment changes the entire relation of the parties ; it recalls the affirmation of indebtedness, and denies its existence. If such supposed indebtedness has been collected whilst the judgment remained in force, the reversal necessarily requires that restitution should be made.

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On the other hand, if whilst the judgment remains unreversed proceedings are taken for its enforcement, and property of the defendant is sold under them, the purchaser acquires a good title. The judgment being valid, and its enforcement not being stayed, all persons relying upon it are protected ; for it is a general principle that a judgment rendered by a court having jurisdiction of the parties and subject matter, however erroneous, is, until reversed, as efficacious for all purposes as though approved by the highest tribunal of the land. To the errors which the court may have committed in its rendition, persons trusting to its protection need pay no attention. Were it not so, the judgment would be of no avail to the successful party until it has been approved by the highest appellate tribunal, or until the time to appeal has expired. The doctrine in this respect is well expressed in *Gray v. Brignardello*, 1 *Wall.* 627. In that case it appeared that certain real property had been ordered sold by one of the district courts of California, in a suit brought to settle an alleged copartnership between certain parties, one of whom had died intestate. The court adjudged that a copartnership had existed between the parties named, and that the real property in question belonged to such copartnership, and directed its sale. The property was accordingly sold. Subsequently, the supreme court of the State reversed the decree, holding that the alleged copartnership was not established by the proofs. The heirs of the deceased party then brought ejectment in the circuit court of the United States, for parcels of the property sold. In that court and in the supreme court, where the case was subsequently carried, it was contended by their counsel that the decree authorizing the sale having been reversed, the sale fell with it ; but the court in reply, said : "It is a well settled principle of law, that the decree or judgment of a court which has jurisdiction of the per-

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son and subject matter, is binding until reversed, and cannot be collaterally attacked. The court may have mistaken the law or misjudged the facts, but its adjudication, when made, concludes all the world until set aside by the proper appellate tribunal. And, although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while a decree or judgment was in full force, and which it authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction, and exercised it, and that the order on the faith of which he purchased was made, and authorized the sale. With the errors of the court he has no concern."

But whilst this doctrine is admitted to be in general correct, it was contended on the argument that it applies only to strangers to the judgment or decree, and does not extend to parties or their privies. And expressions were cited from various opinions of different judges, to the effect that by the reversal the defendant or unsuccessful party in the court below is to be restored to all things which he lost by the erroneous judgment or decree, and that protection is afforded to strangers at judicial sales in order to encourage bidding. Expressions of this kind may be very just and appropriate in connection with the particular facts of the special cases in which they are used ; but they do not express a rule applicable in all cases, or furnish the true reason for the protection extended to purchasers at judicial sales. The principle that the defendant or unsuccessful party in the court below is to be restored to *all things* which he lost by the erroneous judgment or decree, cannot apply to those things the title of which may be transferred by proceedings taken for the enforcement of the judgment or decree when its enforcement is not stayed pending the appeal. The restoration in specie in such cases being impossible without infraction of the principle by which judgments of courts are

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upheld and enforced, it follows that the right which the reversal gives must be that of action to recover an equivalent for the lost thing. And perhaps the rule may be stated thus : That the defendant or unsuccessful party in the court below is to be restored, by reversal, to all things which he lost by the erroneous judgment or decree, if the title to them has not passed by the previous enforcement of the judgment or decree ; and in such case he is to have a right of action for a money equivalent. The rule, as thus stated, would leave the parties to take advantage of the proceedings for the enforcement equally with third persons. There is no reason why they should not have the same protection extended to them as to strangers. The judgment or decree is equally binding upon all, and should be equally efficacious for protection. When the judgment or decree directs a sale of property of the defendant, it may be regarded as a power of attorney to the officer charged with its execution created by the law, and, like any other power, sufficient to give validity to the acts of the officer until the power is revoked by the reversal. There is no prohibition in the law, or objection in the reason of the thing, against a party taking advantage of the proceedings had for the enforcement of the judgment which he has recovered. Strangers are protected, not because a contrary rule would discourage bidding, but because they have a right to rely upon the validity of the judgment, and invoke its protection for all acts done under it whilst it is in force, and for the rights they have acquired thereby. That the rule also has the effect of encouraging bidders at the sale is evidence of its wisdom, but is not the reason of its establishment. In *Parker v. Anderson*, 5 *T. B. Monr.* 455, real property belonging to one Parker had been sold under a decree of a court of equity which was subsequently reversed. At the sale one Anderson became the purchaser ; and after reversal, in a suit brought by the

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heirs of Parker against the heirs of Anderson, the court below refused to compel a surrender of the title of the property. The court of appeals of Kentucky, where the case was taken, held the ruling correct.

"The decree," said that court, "under which both the legal and equitable title was derived, it is true has since been reversed by the decision of this court ; but neither from analogy to legal proceedings, nor the principles and usages of equity, can the reversal of the decree under which the lot was sold and the title conveyed authorize a court of chancery to decree a reconveyance of the title so obtained. The doctrine is well settled at law, that an estate sold under a writ of *feri facias* will be retained by the purchaser, though the judgment upon which the execution issued may be afterwards reversed ; and the rule is the same in equity, where land is sold under the decree of a court of equity, and the decree is afterwards reversed. After the reversal of a judgment at law, or the decree of a court of equity, the person prejudiced by the decree is entitled to the proceeds of the estate sold, either under execution upon the judgment, or in obedience to the judgment, or in obedience to the decree ; and it would, no doubt, be competent for a court of law or equity to compel restitution of the money for which the estate sold. But both law and equity guard, with great circumspection, the interest derived by purchasers under the processes of courts of law, or the decrees of courts of equity ; and unless there be unfairness in the transaction, the title which the purchaser acquires, either by the sale of an officer acting under a *feri facias* at law, or the sale of a commissioner acting under the decree of a court of equity, will never, upon the reversal of a judgment or decree, be disturbed.

"The rule was, in argument, admitted to be, in the general, correct ; but it was attempted to limit its application to purchasers who are neither parties nor

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privies to the judgment or decree under which the sale is made. The reason for such a limitation of the principle is not, however, perceived by us, and we have met with no adjudged case, either at law or equity, wherein any such exception to the rule has been made. The parties to a judgment or decree are, equally with all others, at liberty to bid and purchase property exposed for sale under the authority of a judgment or decree, and there is the same reason for protecting the same interest acquired by a party under a purchase as that of a stranger."

With the views thus forcibly expressed we fully concur.

The only case which at all conflicts with it to which we have been referred, is that of *Reynolds v. Harris*, decided by the supreme court of this State, 14 *Cal.* 667. The circumstances of that case are peculiar. Separate parcels of real property, consisting of mining canals and ditches, had been mortgaged by different parties to secure the same indebtedness. The decree of foreclosure directed the sale of the property upon terms variant from those prescribed by the statute, and in such a manner as to defeat the right allowed by the law of the State of some of the mortgagors to redeem the separate parcels mortgaged by them.

At the sale, the mortgagee and complainant in the foreclosure purchased the entire property—two of the parcels mortgaged being struck off together upon one bid—and received the officer's certificate of the sale—a certificate which would entitle him to a deed at the end of six months, if no redemption were made in the mean time ; but which redemption, from the manner of sale, was impossible with reference to one of the parcels. The amount to be paid to redeem the separate parcels could not be ascertained, as they were sold together. The certificate of sale and the decree were subsequently assigned to Harris. Afterwards the decree

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was reversed so far as it directed the sale, and on petition of defendants the sale was set aside, and the credit allowed for the amount bid vacated.

It will be thus seen that the sale was not perfected when the proceedings were set aside, and upon this fact, together with the departure in the sale from the directions of the statute, the action of the court may be sustained. But there is much in the opinion which we think requires qualification, and which, without qualification, we are satisfied, from the extended examination we have given to the authorities, is unsupported by any well considered adjudication. We find no case which draws the distinction there taken between parties and strangers, and makes the upholding of a judicial sale, after reversal of the judgment or decree under which it was made, depend upon the character of the purchaser.

If now we test the question presented by the application before us, we shall find it one of easy solution. This court, in rendering its decree of September, 1865, had jurisdiction of the parties and of the subject matter. It passed upon the amount of indebtedness of the South Fork Canal Company to the complainant, upon the existence of the lien asserted, and its extent. It adjudged that the lien extended to the entire flume and canal, and it decreed the sale of the property in case payment of the complainant's demand was not made by a day designated. The payment was not made, and the sale took place, the master following in all particulars the direction of the decree. His report of his proceedings was not excepted to, and was confirmed. The complainant was mentioned in the decree as a possible bidder, and provision made for crediting his bid on the amount adjudged due to him. The master reported that the assignee of the complainant, Hosmer, became the purchaser, and when the report was confirmed, the master was directed to execute to him a deed

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of the property. If Hosmer and his grantee cannot, under these circumstances, trust to the title thus acquired, it is difficult to imagine any case of judicial sale which may not be vacated upon a subsequent reversal of the judgment or decree under which it is had. We are clear that the purchaser took a title to the premises which cannot be disturbed. That part of the motion, therefore, which asks that the sale be set aside, and the property sold restored to the defendant, is denied ; and the decree to be entered on the mandate of the supreme court will contain the provisions already mentioned, without directing the enforcement of the lien upon the sections named.

The defendants are entitled to have the costs incurred by them in the supreme court credited on the amount found by the master as due the complainant.

Counsel of the complainant will prepare a draft of the decree, and present it for settlement, upon notice, to the counsel of the defendants.

Decree accordingly.

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United States v. Peters.

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## UNITED STATES v. PETERS.

*District Court ; Eastern District of Michigan, March  
T., 1870.*

## COUNTERFEITING.—REQUISITES OF INDICTMENT.

An indictment for "falsely making," &c., coin of the United States, under section 20 of the crimes act of 1825, 4 *Stat at L.* 121, need not aver an intent to pass the coin as true, nor an intent to defraud.

Motion to quash an indictment.

The defendant, Frederick W. Peters, was indicted, under section 20 of the crimes act of 1825, for counterfeiting the coin of the United States.

*Mr. Russell*, for the motion.

*Mr. Maynard*, district-attorney, opposed.

WITHEY, J.—The indictment charges that Peters *falsely made*, forged, and counterfeited half and quarter-dollar coin, in the similitude of the silver coin of the United States, and also assisted in doing the same thing ; but the offense is not charged to have been committed *with intent to pass as true*, nor with *intent to defraud anybody*.

The motion rests on the omission to charge the intent. The court is of the opinion that the intent to pass, &c., constitutes no part of the crime as defined by the statute. The crime consists in *falsely* making, forging, or counterfeiting. This is a distinct offense, viz: to make with a false intent. The indictment charges, in the language of the statute, that defendant

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The Magenta.

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“did falsely make,” &c. Under this charge it would be no proof of an offense to show that Peters made the coin from curiosity or amusement, or for other purposes, without any design to falsify the coin of the United States. Such false purpose may be shown by proof that it was with intent to pass, utter, publish, or sell, or with intent to deceive any person.

Another offense defined by section 20 of the act of 1825 under consideration, is the passing, &c., or bringing into the United States, *with intent* to pass as true, knowing the same to be false, with intent to defraud. Here, an ingredient of the offense is the intent to pass as true, and intent to defraud, and therefore must be charged in order to justify sufficient proof to convict.

We are entirely clear that the words of the section, “with intent to pass as true,” and to defraud, do not relate to the *falsely making* coin in the semblance of the coin of the United States.

Motion denied.

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THE MAGENTA.

*Circuit Court, Fifth Circuit; District of Louisiana,  
April T., 1870.*

## COLLISION.—DAMAGES.

The custom of steamboats navigating the Mississippi river, in respect to directing their course when meeting each other,—explained.  
Neglect on the part of a pilot of a river steamboat to lay her course, when approaching another boat, in conformity to the well settled custom of boats plying upon that river; or the failure to keep a

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proper lookout,—*e. g.*, when (especially at night) the man on the lookout is stationed in the pilot-house behind the steamer's chimneys, instead of on the hurricane deck, in front of them,—is a fault in navigation which exposes the steamboat to liability for a collision occurring in consequence.

Where both of the colliding vessels are in fault for the collision, the aggregate damages sustained by the two should be shared equally between them.

Appeal from a decree in admiralty.

*E. C. Billings*, and *A. De B. Hughes*, for the libellant.

*R. H. Marr*, for the claimant.

WOODS, J.—About nine o'clock of the night of November 11, 1865, the steamers Brazil and Magenta collided near Bonnet Carre Point, on the Mississippi river, about thirty-eight or thirty-nine miles above the city of New Orleans. The result of the collision was the sinking and loss of the steamer Brazil and cargo. This suit is brought by the owner of the Brazil against the steamer Magenta to recover for the damage sustained.

There is much conflict of testimony in the case ; but the following facts are not disputed, or are clearly established by the evidence.

The Magenta was ascending and the Brazil descending the river. The Magenta being the ascending boat gave the first signal, to wit, two whistles, indicating her purpose to pass to her own left or port side. This was responded to by the Brazil with two whistles, indicating that she understood the signal of the Magenta, that she assented to it, and her own purpose to pass to her own left or port side. So that, had the signals been observed, each boat in passing the other would have presented to her her starboard side. It is also in proof and undisputed, that the custom or common law of the river is, for ascending boats to run the points, and for

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the descending to run the bends. In other words, the ascending boat takes her course from the point on one side of the river to the nearest point on the other side, thus enabling her to avoid the obstacle of the current to some extent, and sail in the eddy water near the banks and under the point ; the descending boat follows the main channel current, or what is known in the law as the *line* of the stream, following the bends, and thus uses the force of the current as well as her steam power to propel her on her course. It is also established that when the steamers first came in sight of each other the Brazil was in the middle of the river rounding Bonnet Carre Point, which is on right bank of the river, and the Magenta was passing Thirty-five Mile Point, a mile and a half or two miles below, on the left or east bank. It also appears that the bow of the Brazil collided with the starboard side of the Magenta forward of the wheel ; that her bow for a distance of four or five feet on the larboard side and fifteen or twenty feet on her starboard side was knocked off ; and that she sunk on the bar on the right bank of the river from one hundred and fifty to two hundred and fifty yards from shore.

As to what part of the river the collision occurred at, there is a conflict of testimony between the libelants and claimants.

The libelants say it was about the middle of the river, and the claimants that it was near the right bank, and as close to the bar in the right bank as it was safe for the Magenta to run. The weight of the direct evidence upon this point is about equally balanced, but when the probabilities of the two versions, that of the libelants and that of the claimants, are considered, we think the libelants have the advantage. The pilot of the Brazil is not shown to be *non compos mentis*, and it seems no person, unless insane, piloting a steamer of two hundred tons burden, after assenting to a signal to pass to the larboard, would port his helm and direct his

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*The Magenta.*

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course to the starboard across the river and run into a steamer of one thousand two hundred or one thousand three hundred tons burden. I am forced to the conclusion, therefore, that the collision took place near the middle of the river, and that the Brazil did not change her course.

And here is where her fault lies. Her pilot knew or ought to have known the custom of the river, that ascending boats ran the points. The signal of the Magenta indicating that she intended to keep to the left was notice to the Brazil that the Magenta proposed to cross from Thirty-five Mile Point, and run up the bank along and under Bonnet Carre Point, and it was his duty, instead of stopping his boat, to put his helm a-starboard and direct his course close in on the left bank of the river. If, when the signals were exchanged, he had done this, a collision would have been impossible.

It is very clear from the testimony, that both the captain and the pilot of the Brazil were inexperienced and unfit to have charge of a boat. With skill and prudence on the part of these officers, I have no doubt that a collision might have been avoided.

But it is just as clear that there was fault on the part of the Magenta.

When signals were exchanged between the two boats, the officers of the Magenta must have known, or should have known, that a collision was possible ; they intended to cross the river and run up under Bonnet Carre Point ; they knew that the Brazil was coming down the current of the river, running the bends according to the custom of descending boats, and it was their duty to have a lookout stationed in such a position, on the boat, as to keep the Brazil in view, and give warning of impending danger. According to the testimony of claimants themselves, this was not done.

Carter, the pilot of the Magenta, testifies : "A few moments after exchanging signals, the lights of the de-

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scending boat were hidden from witness by the chimneys of the Magenta ; this time was probably half a minute, not more than a minute. When I next saw the lights, I discovered that the Brazil, the descending boat, was running directly across the river, square across our bow."

Captain Leathers, of the Magenta, testifies that he and both the pilots were in the pilot-house at the time of the collision. If the chimneys of the Magenta hid the lights of the Brazil from the pilot, Carter, they hid them also from the other pilot and the captain. The proper and usual place for the look out was on the hurricane deck, in front of the chimneys. No testimony is offered on the part of claimants to show that a man on the look out was stationed there, and it is fair to presume that there was none or we should have the fact in the testimony. The pilot-house, behind the chimneys, is not the place for the man on watch, when passing other steamers in the night. If a proper look-out had been maintained on the Magenta, the impending danger of a collision might have been seen, and by good seamanship avoided.

I find, therefore, that both steamers were at fault ; that by the exercise of proper watchfulness and skill on the part of either, the collision might have been avoided.

In such a case, according to the rules laid down by the supreme court in *The Catherine v. Dickinson*, 17 How. 170, the loss must be divided.

The damage to the Magenta was, according to Captain Leathers, from three to five hundred dollars ; and he is the only witness that speaks to the point. I put the damages, therefore, at three hundred dollars.

The testimony as to the damage occasioned by the loss of the Brazil is very conflicting ; but after a careful review of the testimony, I am satisfied the court

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United States v. Five hundred boxes of Pipes.

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below fixed the damage very near the correct amount, namely, twelve thousand dollars. From one-half this amount, to wit, six thousand dollars, should be deducted the one-half of the estimated damage suffered by the Magenta, namely, one hundred and fifty dollars, leaving the sum of five thousand eight hundred and fifty dollars as the amount of the decree in favor of libellant against the Magenta.

Let a decree be entered accordingly, each party to pay his own costs.

Decree accordingly.

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UNITED STATES v. FIVE HUNDRED BOXES  
OF PIPES.

*District Court, Eastern District of Michigan; April,  
1870.*

PAYMENT OF DUTIES.—ADMIRALTY JURISDICTION.

The admiralty jurisdiction of the district court in revenue cases, extends only to seizures for forfeitures under duty laws; as conferred by section 9 of the judiciary act of 1789, 1 *Stat. at L.* 76. The payment of duties can only be enforced by proceedings on the common law side of the court.

*It seems*, where imported goods have been seized for an alleged violation of the revenue laws, and a decision has been rendered in favor of the claimant, that the United States is not deprived of its lien upon the goods for the duties unpaid.

Motion to rectify a decree.

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United States v. Five hundred boxes of Pipes.

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This was an information *in rem* on a seizure for undervaluation. A decree on the merits was passed in favor of claimants, with a certificate of probable cause to the collector, and a writ of restitution to claimants, "upon payment of duties, or filing of a re-exportation bond."

Motion was now made to strike out the words in quotations, requiring the payment of duties, &c.

A. Russell, for the motion.

A. B. Maynard, District-Attorney, for the government.

LONGYEAR, J.—This case is in the admiralty; and it has been long since settled by the supreme court, 12 Wheat. 486, that this court possesses no admiralty jurisdiction to enforce the payment of duties. Admiralty jurisdiction in revenue cases extends only to seizures for forfeitures under laws of impost, navigation, or trade of the United States, as conferred by section 9 of the judiciary act of 1789, 1 Stat. at L. 76. A suit to enforce the payment of duties must be on the common law side of the court, and not in the admiralty.

This precise point was decided on mature consideration, by the supreme court, in the case of Three hundred chests of Tea, 12 Wheat. 486. That decision is of course conclusive upon the point, so far as this court is concerned. See, also, The Waterloo, Blatchf. & H., 120.

In a case which was before the supreme court in 1809, Yeaton v. United States, 5 Cranch, 281, 284, a decree seems to have been entered very much like the one in the present case; but the point here made does not seem to have been presented to or considered by the court, and the case is entitled to no weight as authority, as against the later decision (1827) in the same court,

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in the Tea case, above cited ; in which the point was presented and fully considered.

The motion is granted, and the decree must be modified accordingly.

As this decision is based upon a want of jurisdiction, the decree as modified, cannot, of course, in any manner affect any claim or lien which the United States may have for duties. Whether any such claim or lien exists, is a question so entirely outside this case that any consideration or decision of it here would seem to be out of place. I will, however, remark in passing, that by the act of July 18, 1866, 14 *Stat. at L.* 186, § 31, the legal custody of the property seized has been and is now in the collector. If the duties have not been paid, they are of course still due and payable ; and with the light that I now have, I can see no reason why they are not a lien now just the same as before the seizure.

The doctrine of merger can no more be applied in this case than in the case of a mortgage held by a person claiming the title when it is for his interest to keep the mortgage alive ; in which case, on the failure of the title, the mortgage lien can always be enforced. Neither can it be said that like a pledge, the lien is defeated by a voluntary relinquishment of possession, because the United States have all the time remained in full legal possession.

Motion granted.

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Northrop v. Gregory.

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## NORTHROP v. GREGORY.

*District Court; Eastern District of Michigan, June  
T., 1870.*

## ADMIRALTY.—ENTRY OF DECREE.

A motion to open a decree in admiralty entered by default, must be made within ten days after entry; otherwise it must be denied.

A motion to open a decree in admiralty entered by default, must be accompanied by the answer proposed to be filed, or at least by a statement of the grounds of defense intended; so that the court can determine whether the defense is meritorious.

A decree signed by a district judge after he has tendered a conditional resignation, but before it has been accepted by the government, is valid.

Motion to rescind a decree entered by default, and allow respondent to answer.

The motion was made upon two grounds.

1. Because of mistake by respondents as to return day of the citation; with general allegations of a meritorious defense.

2. Because Judge WILKINS, who signed the decree as District Judge, was not such at the time of entry and signing of the decree, he having ceased to be such by his previous resignation; and the decree is therefore a nullity.

*Mr. Cheever*, for the motion.

*H. B. Brown*, opposed.

LONGYEAR, J.—The decree was entered February 1, 1870, and this motion was made on the 18th of the same month, seventeen days after the decree was entered.

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Northrop v. Gregory.

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By Rule 40 the time within which a decree in admiralty may be rescinded is limited to ten days after the entry of the decree. This rule, made by the supreme court in pursuance of law, is of the same binding force upon this court as if it were a statute, and it cannot be disregarded. The limitation to ten days is an implied prohibition against what is so limited being done after that time. The motion, therefore, so far as it is based upon the first ground stated, is too late, and cannot be entertained.

Even if the motion had been in time, there is a fatal objection to its being allowed upon the first ground stated. It is not accompanied with the answer proposed to be put in; neither are the facts proposed to be set up by way of defense divulged, so that the court may see that the same are relevant, and if proven, would constitute a meritorious defense.

2. The motion, however, as to the second ground stated, stands upon a different basis, and might be made at any time, as in this respect it goes to the very existence of the court at the time the decree purports to have been entered.

Judge WILKINS' resignation was made and filed December 7, 1869. The decree was entered, as we have seen, February 1, 1870. The commission of Judge WILKINS' successor, as appears by the record of it in this court, bears date February 13, 1870, and he took the oath of office, and his seat upon the bench, March 4, following. The record shows that Judge WILKINS continued to exercise the duties of district judge the same after his resignation was filed as he had done before, and up to the time his successor qualified and took possession of the office.

Judge WILKINS' resignation was made under and in pursuance of section 5 of the act of Congress entitled "An Act to amend the judicial system of the United States," approved April 10, 1869, providing "That

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any judge of any court of the United States who, having held his commission as such at least ten years, shall, after having attained to the age of seventy years, resign his office, shall thereafter during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation."

Judge WILKINS' resignation (after reciting that portion of the act upon which it is founded), is in the following language: "For the sake of enjoying the rights and privileges conferred by said act, and under its provisions, *and not otherwise*, I do hereby resign," &c. That is, if by the repeal or modification of the act, or otherwise, he should be deprived of the rights and privileges conferred by it, or its provisions should be withdrawn or materially altered, then he did not resign. This is the plain interpretation of the language. The resignation was, therefore, conditional in its terms; and it remained conditional until the government had accepted it, and acted upon it, by the appointment and confirmation of a successor, when it became absolute and binding upon both parties—upon the judge to relinquish the office; and upon the government to pay him his salary during the residue of his natural life.

We are not, however, necessarily concerned here with the question, whether or not Judge WILKINS' resignation deprived him of his office from and after its date, because, if at the time of the entry of the decree he was, in point of law, judge *de facto*, that is sufficient to sustain the record. That he was such at least, I entertain no doubt.

What constitutes an officer *de facto* has been very clearly stated, thus: "An officer *de facto* is one who exercises the duties of an office under color of an appointment or election to that office. He differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any color of right; and on the other, from an officer *de jure*, who is, in all

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respects, legally appointed and qualified to exercise the office." Judge STORR, of Connecticut, in delivering the opinion of the court in *Plymouth v. Painter*, 17 Conn. 585, 588. And the same learned authority adds, "These distinctions are very obvious, and have always been recognized."

Judge WILKINS was certainly not a usurper. He was in lawful possession of the office; and notwithstanding his resignation, he never relinquished that possession until his successor was appointed and qualified, but, on the contrary, he continued to exercise the duties of the office the same as before. He still held his commission. His resignation was conditional in its terms, and he was entitled to hold on to his commission until the government had, in some way, manifested its acceptance of or acquiescence in those conditions. He was, therefore, no usurper, but was in reality in the exercise of the duties of the office, under color of right, at least. Under these circumstances, he was, by all the authorities, judge *de facto*, if nothing more. At all events, he was not a usuper. And if not a usurper, he was an officer either *de facto* or *de jure*, and for the purposes of deciding this motion, it matters not which; either is sufficient to sustain the record.

Motion denied.

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Hall v. Unger.

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## HALL v. UNGER.

*Circuit Court, Ninth Circuit; District of California,  
July, 1867.*

## INSANITY.—CAPACITY TO EXECUTE POWER OF ATTORNEY.

Mania,—which is mental derangement accompanied by excitement,—and dementia,—which is derangement accompanied by general enfeeblement of the faculties—do not invariably affect all the operations of the mind. The law recognizes the fact that either of these forms of derangement, may be limited (as monomania always is) to particular subjects, and may be consistent with capacity to act upon other subjects.

In determining the ability of an alleged insane person to execute any particular act, the inquiry should first be, what degree of mental capacity is essential to the proper execution of the act in question; and then, whether such capacity was possessed, at the time, by the party.

The execution of a power of attorney to convey land requires no greater exercise of reason than does the making of a will of real property; and the question of capacity may be determined by the same rules, in either case.

The definition of "a sound and disposing mind and memory," given by WASHINGTON, J., in *Harrison v. Rowan*, 3 Wash. C. Ct. 585,—viz: that the testator must be capable of making his will, with an understanding of the nature of the business in which he is engaged, a recollection of the property of which he means to dispose, of the persons who are the objects of his bounty, and of the manner in which it is to be distributed between them; that it is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form; but it is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, the distribution of his property in its simple form,—approved, and applied as a proper test for determining the capacity of a land owner to make a power of attorney authorizing the conveyance of his lands.

The law presumes that every adult man is sane, and possessed of the

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absolute right to sell and dispose of his property in whatever way he may choose ; his will in every case standing as the reason of his conduct. The burden of proving insanity, lies on the party who asserts it. The fact of the existence of a prior or subsequent lunacy, except where it is habitual, does not suffice to change the burden of proof. But when such habitual insanity is shown to have existed, then the presumption is, that the party was insane at the time ; and the burden of proof rests with those who allege the party's competency.

In considering whether an act impeached on the ground of insanity was valid, the attending circumstances may be considered ; particularly the reasonableness of the act, and the approval of it at the time by the relatives of the party.

*It seems* that, in general, a witness who subscribes an instrument, or an officer who takes the acknowledgement of one, is bound to satisfy himself, before he signs, that the party has the requisite mental capacity to execute the instrument ; and that the presumption of, capacity is therefore strengthened by the fact of attestation.

**Trial by a jury.**

This was an action to recover possession of lands. It was originally commenced by Mary K. Hall, who was the widow, and four other plaintiffs, who were the children of John Hall, deceased ; from whom the plaintiffs claimed to inherit the premises in question. Mary K. Hall died during the proceedings, after which the action was prosecuted by the other plaintiffs. The action was originally brought against Adolph Unger, and seventeen other defendants ; but the plaintiffs discontinued against Unger and several other defendants, and prosecuted the action against Henry S. Dexter and six others.\*

The leading question of general interest, presented upon the trial, related to the mental capacity of John

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\* Notwithstanding the change of parties, the action was known, throughout proceedings in the circuit court, as Hall v. Unger. But subsequent proceedings on error were instituted under the title Dexter v. Hall ; under which any decision of the supreme court will doubtless be reported.

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Hall to execute a certain power of attorney. The facts, so far as are necessary to present this question, were as follows :

The land in question was a lot situated upon Bryant-street, in San Francisco. The plaintiffs claimed it as heirs of John Hall ; and they proved a grant of the land to Hall from an alcalde in San Francisco, and subsequently confirmed by the legislation of the State and of the United States, which vested the title in him ; the relationship of the plaintiffs to Hall ; his death ; the possession of the lands by the defendants, and other facts requisite to make out a presumptive right to recover.

To meet the case thus presented, the defendants gave in evidence a power of attorney, purporting to be executed by John Hall, on December 27, 1852, to one James W. Harris, empowering him to sell and convey the real property in controversy, and also to appoint a substitute to act for him. This power bore a certificate of due acknowledgment before a commissioner of California, resident in Pennsylvania. They also produced a substitution of the power to one David B. Rising, and a conveyance of the premises by Rising, acting under this substitution, to Daniel D. Page, under whom they claimed title.

This power of attorney, and the acts done under it, the plaintiffs assailed, contending that, at the time it purported to have been executed, Hall was insane, and incapable, by reason of his insanity, from attending to any business.

Many witnesses were examined upon this question ; but the recapitulation of their testimony given in the judge's charge is sufficient to explain his general instructions.

*Hall, McAllister, & Galpin*, for the plaintiffs.

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*Messrs. J. P. Hoge and Sol. A. Sharp, for the defendants.*

FIELD, J., upon the subject of insanity instructed the jury as follows :

*Gentlemen* :—I do not propose to attempt any nice or philosophical exposition of the subject of insanity. I should certainly fail if I made the attempt ; and if I could succeed, the result would not be of any service to you in determining this case. Any elaborate and extended dissertation, if it were possible for me to present such a one, would only tend to perplex and confuse your minds. I shall make a few observations on the subject, and refer to the rules laid down by the authorities to guide you in considering it, and then call your attention briefly to the evidence in the case.

The physicians who have been examined, and the text writers, declare that it is impossible to give any consistent definition of insanity ; that no words can comprise the different forms and characters which this malady may assume. The most common forms in which it presents itself, are those of mania, monomania, and dementia. All these imply a derangement of the faculties of the mind from their normal or natural condition. Idiocy, which is usually classed under the general designation of insanity, is more properly the absence of mind than the derangement of its faculties ; it is congenital, that is, existing in birth, and consists not in the loss or derangement of the mental powers, but in the destitution of powers never possessed.

Mania is that form of insanity where the mental derangement is accompanied with more or less of excitement. Sometimes the excitement amounts to a fury. The individual in such cases is subject to hallucinations and illusions. He is impressed with the reality of events which have never occurred, and of things which do not exist, and acts more or less in conformity

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with his belief in these particulars. The mania may be general, and affect all or most of the operations of the mind ; or it may be partial, and be confined to particular subjects. In the latter case it is generally termed monomania.

Dementia is that form of insanity where the mental derangement is accompanied with a general enfeeblement of the faculties. It is characterized by forgetfulness, inability to follow any train of thought, and indifference to passing events. "In dementia," says Ray, a celebrated writer on medical jurisprudence, "the mind is susceptible of only feeble and transitory impressions, and manifests but little reflection even upon these. They come and go without leaving any trace of their presence behind them. The attention is incapable of more than a momentary effort, one idea succeeding another with but little connection or coherence. The mind has lost the power of comparison, and abstract ideas are utterly beyond its grasp. The memory is peculiarly weak ; events the most recent and most nearly connected with the individual being rapidly forgotten. The language of the demented is not only incoherent, but they are much inclined to repeat insulated words and phrases without the slightest meaning."

These common forms of insanity, mania, monomania, and dementia, present themselves in an infinite variety of ways, seldom exhibiting themselves in any two cases exactly in the same manner. Mania sometimes affects, as already observed, all the operations of the mind ; and sometimes the mental derangement appears to be limited to particular subjects. An absence of reason on one matter, indeed, on many matters, may exist, and at the same time the patient may exhibit a high degree of intelligence and wisdom on other matters. The books are full of such cases. Many of them have been cited to you by counsel on the argument. They show, in-

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deed, a want of entire soundness of mind ; they show partial insanity ; but this does not necessarily unfit the individuals affected for the transaction of business on all subjects. In a case which arose in the prerogative court of England (*Dew v. Clark*, 3 *Addams Eccl.* 79), it was said by counsel that partial insanity was something unknown to the law of England. To this suggestion the court replied : " If he meant by this that the law of England never deems a person both sane and insane at the same time upon one and the same subject, the assertion is a mere truism. But if by that position it be meant and intended that the law of England never deems a party both sane and insane at different times on the same subject, and both sane and insane at the same time on different subjects, there can scarcely be a position more destitute of legal foundation, or rather there can scarcely be one more adverse to the current of legal authority." In that case the court cited the language of LOCKE, that " A man who is very sober and of right understanding in all other things, may, in one particular, be as frantic as any man in Bedlam ;" and of LORD HALE, who says, " There is a partial insanity of mind and a total insanity ; in the first, as it respects particular things or persons, or in respect of degrees, which is the condition with very many, especially melancholy persons, who for the most part discover their defect in excessive fears and grief, and yet are not wholly destitute of the use of reason."

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So, too, in dementia, where there is a general enfeeblement of the mental powers, there is not usually equal weakness exhibited on all subjects, nor in all the faculties. Those matters which, previous to the existence of the malady, the patient frequently thought of and turned over in his mind, are generally retained with greater clearness than less familiar objects. One faculty may be greatly impaired,—the memory, for example,—while other faculties retain some portion of their

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original vigor. The disease is of all degrees, from slight weakness to absolute loss of reason. The enfeeblement usually progresses gradually—through a twilight, as it were, of reason, before the darkness of night settles upon the mind.

It is important to bear these observations in mind ; for it does not follow from the fact that mania or dementia be shown, that there may not be reason or capacity for business on some subjects. In determining the ability of the alleged insane person to execute any particular act, the inquiry should first be, what degree of mental capacity is essential to the proper execution of the act in question ; and then whether such capacity was possessed at the time by the party. It is evident that a very different degree of capacity is required for the execution of a complicated contract, and a single transaction of a simple character, like the purchase or sale of a lot.

The act done in the case at bar was the execution of a power of attorney to sell three lots in San Francisco.

The act required no greater exercise of reason than is essential to the valid execution of a will of real property ; and the authorities which determine the degree of capacity essential in such cases may properly be relied upon as furnishing the proper rule in this case. And those authorities concur, especially the later authorities, substantially in this ; that it is only necessary to the validity of the will that the testator had sufficient mind and memory to understand the business upon which he was engaged, and the effect of the act he was doing. "He must," in the language of Judge WASHINGTON, in *Harrison v. Rowan*, 3 *Wash. C. Ct.* 585, "have a sound and disposing mind and memory. In other words, he ought to be capable of making his will, with an understanding of the nature of the business in which he is engaged—a recollection of the property he means to dispose of—of the persons who are the objects

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of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed—the distribution of his property in its simple forms. It is the business of the testator to dictate the purposes of his mind, and of the scrivener to express them in legal form.”

It is true, as stated by counsel, that the authorities generally go to the extent that it requires less intelligence and reason to make a will than to execute a contract ; but for the execution of an act of a simple character, not involving complicated details and provisions, the rule laid down by Judge WASHINGTON is sufficiently stringent.

According to that rule, it was material to the valid execution of the power in this case, that Hall should, at the time, have possessed sufficient mind and memory to understand the nature of the business he was engaged in, to know the character and location of the property, and the object and effect of the act he was doing ; in other words, it was essential that he should recollect that he was the owner of the property mentioned, that such property was situated in the city of San Francisco, and that the instrument conferred authority for the sale of the same.

In considering this case, it is to be remembered that the law presumes that every adult man is sane, and possessed of the absolute right to sell and dispose of his property in whatever way he may choose ; his will in every case standing as the reason of his conduct. Whoever denies his sanity must establish the position ; the burden of proof rests upon the party who alleges the mental derangement. And if, as in the present case, the validity of a particular act is assailed, the

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assailant must establish that at the time the act was done the insanity existed. Testimony as to previous or subsequent insanity will not answer, unless the insanity be shown to be habitual—that is, such as is in its nature continuous and chronic. The fact of the existence of a prior or subsequent lunacy, except where it is habitual, does not suffice to change the burden of proof. The case is, however, otherwise, when such habitual insanity is shown to have existed ; then the presumption is that the party was insane at the time, and the burden of proof rests with those who allege the party's competency.

Again, in considering whether a particular act assailed for the alleged insanity of the party was valid or not, regard must be had, in the absence of direct testimony on the point, to all the attending circumstances—the reasonableness of the act in itself, and its approval by the family and relations of the party. The reasonableness of the act and the approval of the family will not render the act valid, if the party were at the same time insane, but they are circumstances tending to show that the party was not at the time incompetent, and that his family and relatives did not so regard and treat him.

In this case it appears that the lot in controversy was at the time in the adverse possession of others, and that the supreme court of the State had decided that alcalde grants conferred no title. A sale of his interest, if anything could be obtained for it, under the circumstances, would seem to have been a judicious and a wise step.

The only testimony which relates directly to the time of the execution of the power is that of Broadhead, the witness to the instrument, and the officer before whom it was acknowledged. It was the duty of this officer to satisfy himself of the competency of Hall before attesting the instrument. As said by the

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supreme court of Pennsylvania, in *Werstlee v. Custer*, 10 *Pa.* 503, "No honest man will subscribe as a witness to a will or any other instrument executed by an insane man, an imbecile, an idiot, or a person manifestly incompetent for any reason to perform, with legal effect, the act in question. A duty attaches to the witness to satisfy himself of the competency of the party before he lends his name to attest the act. Like the magistrate who takes the acknowledgment of a deed, he is to be reasonably assured of the facts he undertakes to verify, else he makes himself instrumental in a fraud upon the public. And, therefore, the legal presumption, always favorable to competency, is greatly strengthened by the fact of attestation by witnesses."

Such is the general effect of the attestation of a witness and officer; but whether the attestation in the present case, under the peculiar circumstances in which it was made, can add anything to the legal presumption of competency, may well be doubted. It is a circumstance worthy of consideration, whether the commissioner should have gone to the asylum to take the acknowledgment of an inmate of the institution, with whom he had no previous acquaintance, without information from the officers of the institution that the patient at the time was in possession of sufficient reason to understand the business which it was proposed he should execute.

Broadhead testifies that he went to the Frankfort Asylum to take the acknowledgment of Hall, with whom he was not previously acquainted; that he read the power to Hall, and handed it to him to read, and asked him if he understood it; that Hall replied "perfectly," or words to that effect; and that the property was valuable, and that he wanted it sold for the benefit of his wife and children. The commissioner also testifies, that he could not have believed Hall was on all subjects

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of sound mind, from the simple fact that he was an inmate of the asylum ; but that, as to the power of attorney, Hall was clear as to what he was giving ; that there was nothing in his appearance which led the commissioner to suppose he was insane, and from the fact that he stated that he wanted the property to be sold, the commissioner was led to believe he had a lucid interval. The witness adds, that he would not have permitted Hall to execute the instrument, and he would not himself have taken the acknowledgment, unless Hall had been of sufficient mind, memory, judgment, and understanding, to execute such a paper.

Aside from the peculiar circumstances under which the commissioner acted, there is one fact in his testimony which should be considered by you as throwing possibly some light on the condition of Hall's mind, at the time, somewhat in conflict with the commissioner's own opinion. He states that Hall at first wrote something besides his signature to the instrument. The instrument itself shows that there has been an erasure of something near the signature. The commissioner states, as his impression, that Hall wrote some other name than his own. This is at least a singular circumstance, if, as stated by the commissioner, he had heard the instrument read, and perfectly understood its purport.

We will now briefly refer to the testimony produced by the plaintiffs, to show the general insanity of Hall at the time he executed the power in question. If he was then insane, and his insanity was general, the instrument was a nullity, and no title could be transferred under it. In that case the plaintiffs are entitled to a verdict. It matters not, if such were the case, what consideration may have been paid to the attorney, or with what good faith the parties may have purchased. The instrument, in such case, is no more to be regarded

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as the act of John Hall than if he was dead at the time of its execution.

It appears from the testimony produced by the plaintiffs, that John Hall was a lieutenant in the United States navy, and at one time had the command of a vessel of war; that he was, in 1848, on this coast; that whilst here, the *alcalde* grant was issued to him; that in 1849, he became unwell, and his health was so much affected that he was sent to the Eastern States under the charge of a physician; that he arrived in New York and joined his family in June, 1849; that he remained with his family until June, 1851—two years; that during this period, there were such indications of insanity that, upon the advice of his consulting and family physicians, he was sent to the asylum at Frankfort; that he remained there, under treatment for insanity, until January 25, 1854, when he was removed to the State Insane Asylum; and that he died an inmate of this latter institution, in September, 1860.

The witnesses produced by the plaintiffs are either the physicians attending, or persons immediately surrounding Hall, both before his entry into the asylum and afterwards. The testimony discloses the possession by him of hallucinations and illusions on many subjects. Mr. Wright states, that whilst in New Jersey, after his return, he was at times greatly incensed at his neighbors, asserting that they had destroyed his garden—which they had not—and complained of noises in his ears, which he said arose from a train of cars running through his head.

Miss Harris testified that he was subject to fits of abstraction; had strange fancies; thought he had been to heaven, and said so, and finding his wife was not there, had returned; that he complained much of confusion in his head, and thought trains of cars were running through it; and would object to a light in the

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evening, as being painful to his head and setting it on fire ; that he would work in his garden sometimes for a whole day without food, giving as an excuse that he was obliged to work for his living ; that he would plant vegetables and flowers and soon dig them up, and then charge his neighbors with killing his plants ; he would get excited and threaten to shoot any one who came on his place ; that there was a spring of water in the cellar, which was drained through a vacant lot, and that he at one time took a fancy to fill up the drain, and then, when the water rose, he spent hours in trying to bail it out. He did this repeatedly. He would fill up the drain in the daytime, and his wife would hire a man to open it after night. When remonstrated with for his conduct, he said it was God's will it should be done. He would sometimes fancy himself the Creator, and want parties to address him as such ; at other times he would use the most blasphemous language. He would buy the most unnecessary things, posts and rails, for which he had no use. He took great dislike to certain persons, and would not permit them to come to the house. He would sometimes sit at the table, with a vacant stare, and neither eat himself or help others. He took no notice of his children and no care of his family, although before that he was a devoted husband and affectionate to his children. At times he would treat visitors very insolently, fancying they came to injure him. He would expose himself all day to the hot sun, and if called in, he would say he was too busy, and obliged to work. He fancied he owned everything he saw at the stores, and could not understand why he could not help himself to what he liked.

After Hall was sent to the asylum, it appears he continued subject to hallucinations. Wright testifies that it was impossible to hold any connected conversation with him, or to keep his mind centered on any one subject ; that he fancied his fellow patients were dis-

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tinguished historical characters, and desired to introduce them to the witness. He had scars upon his wrists and arms, and said he had been tattooing himself, a beautiful art he had acquired at the Sandwich Islands, and desired to tattoo the witness, stating that the operation was perfectly painless. Miss Harris states that when she visited him at the asylum, he imagined he was employed to fit out a fleet, and said he was oppressed with care he was so occupied with his business.

Wistar, the steward at Frankfort Asylum, from May, 1852, to September, 1853, testifies that Hall had a great many singular propensities. When awake he spent a great deal of his time in indistinct mutterings and murmurings. He had a propensity for weaving wire and fish bones into his arms and legs, through the flesh and under the skin, very much as a woman would darn a stocking. This resulted in sores, which festered and discharged. He was in the habit of heaping up his bed-clothes in his bed daily in the form of a haystack or pyramid, and would then cap the same with the chamber utensil. He had a fancy of putting on his clothing in a way not designed to be worn. He tore his clothing and bedding. He was very profane and obscene in his language, and spent a good deal of time in what he termed prayer, which in a sane man would have been blasphemy of the worst kind. The testimony of Mrs. Wistar is to the same effect.

Dr. Fithian, the family physician of Hall from June, 1849, until he went to the hospital, pronounces his malady insanity, and says that it was accompanied with unnatural excitement, restlessness, irritability ; that he was incoherent, and had want of connection of thought and expression. He adds that the disease was acute mania, rather than dementia, into which acute mania is apt to run.

Dr. Evans, who was one of the physicians of Hall,

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both before and after he was at the asylum, states as his recollection of the disease, that he was laboring under chronic inflammation of the meninges of the brain, producing mania, and resulting in dementia, and that whilst at the asylum he gradually deteriorated and grew worse, and that he (the doctor) considered him hopelessly insane.

Dr. Worthington, the medical superintendent, pronounces the disease of Hall mania, with a tendency to dementia, and states that he had various delusions, and among others, believed he was the Son of God.

I have stated the most important matters testified to by the witnesses, from which you must draw your conclusions as to the sanity or insanity of Hall at the time the power was executed. I do not refer to the testimony as to Hall's condition after his removal from the asylum at Frankfort to the State Asylum. It is not pretended that after that period he was possessed of lucid intervals, but, on the contrary, he gradually sank from one degree of weakness to another until his death.

You will perceive that the physicians of Hall state that the malady of which he was suffering was originally acute mania, and that it ended in dementia. You will observe that he was affected by similar hallucinations and illusions, both before and after he went to the asylum ; and you will remember, as already stated, in speaking of mania, that it is characterized by hallucinations or delusions ; the patient believing and acting upon the supposed reality of facts and events which have never occurred, or do not exist. The testimony of all the witnesses is that the malady from the commencement continually increased, the patient gradually sinking from one degree of enfeeblement to another. Now, there may have been lucid intervals with the patient arising from an intermission in the operation of the disease. If there was any such intermission and consequent lucid interval in this case, it is for you to deter-

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mine. In considering this matter, you will remember that the malady in this case arose from a disease of the lining membrane of the brain, from what Dr. Evans designates chronic inflammation of the meninges of the brain ; that it had continued with more or less intensity for over three years when the power of attorney was executed. If, therefore, you should come to the conclusion that he was, as asserted by his physicians, insane before he entered the asylum, and that his malady continued to grow worse afterward, you will be justified in finding that it had attained that character which the books designate as habitual insanity, which is continued and settled derangement. If you come to this conclusion, you will then look for proof of his having had a lucid interval when he executed the power. The burden of proof, in that event, that is to say, if habitual insanity be established, lies upon the party who alleges that a lucid interval existed.

Several very able physicians in this city have been called to state their opinions founded upon the evidence of the plaintiffs—that of Broadhead being excluded—as to the probability of lucid intervals in the condition in which Hall is shown to have been. They all express the opinion that such lucid intervals were probable ; indeed, their testimony goes so far as to state that in their judgment his insanity was not, previous to 1853, of such severe and general character as to render him at all times incapable of transacting business on some subjects.

I will only observe, that the opinions of physicians are received in evidence from their superior knowledge of matters connected with their profession. It would be difficult to present in an intelligible way to a jury all the grounds upon which learned professional men may base their judgments. The law, therefore, allows their  
\* \* opinions to be received, but at the same time, where professional men are of equal standing and intelligence,

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it awards much higher consideration to those opinions which are based upon personal observation and examination of the patient.

Verdict for the plaintiffs.

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UNITED STATES v. SCHUMANN.

*Circuit Court, Tenth Circuit ; District of California,*  
1866.

CRIMINAL PROCEDURE.—POWERS OF UNITED STATES  
DISTRICT-ATTORNEY.

The district-attorney of the United States has no absolute power to dismiss a criminal charge while an examination of the accused is proceeding before a commissioner.

After indictment found, and before trial commenced, the district-attorney has absolute power to enter a *nolle prosequi*. But while the charge is under examination, either before a commissioner or the grand jury, he attends only as counsel of the government, to present the evidence against the accused ; and has no control over the course to be pursued.

The powers and duties of commissioners, in criminal cases,—explained.

Question certified for the opinion of the court by a United States commissioner.

One Schumann, having been brought before a United States commissioner at the city of San Francisco, for examination upon a charge of having committed a public offense against the laws of the United States,

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the district-attorney proposed, before the examination was completed, to dismiss the proceeding. The commissioner applied to Judges FIELD and HOFFMAN, then holding the circuit court, for their opinion as to the power of the district-attorney to do so. The following opinion was rendered in answer to this question.

FIELD, J.—We have looked into the question upon which the commissioner has asked the opinion of the court as to the control of the district-attorney over criminal proceedings pending before him; and will briefly state the conclusion we have reached. The district-attorney, we are informed, asserts an absolute right to dismiss any criminal proceedings before the commissioner both before and after the examination of the accused. The commissioner, on the other hand, denies such control, and insists that his authority is independent of any action of the district-attorney, and is to be exercised in all cases as his judgment may dictate upon the evidence presented.

The office of commissioner was created by the act of February 20, 1812, and his duties were at first limited to taking acknowledgments of bail and affidavits. By several subsequent acts his powers have been greatly enlarged. Among other things, he is invested with all the authority to arrest, imprison, or bail offenders against the laws of the United States, which any justice of the peace or other magistrate of any of the United States can exercise under the thirty-third section of the judiciary act of 1789. That section provides that "for any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace or other magistrate of any of the United States where he may be found, agreeably to the usual mode of process against offenders in such State, and at the expense of the Uni-

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ted States, be arrested, imprisoned, or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense."

The same act also authorizes the commissioner, upon any *hearing* before him, when the offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, in his discretion, to require a recognizance from witnesses for their appearance at the trial.

He is thus made a magistrate of the government, exercising functions of the highest importance to the administration of justice. He is an examining and committing magistrate, bound to hear all complaints of the commission of any public offense against the laws of the United States in his district, to cause the offender to be arrested, to examine into the matters charged, to summon witnesses for the government and for the accused ; and to commit for trial or to discharge from arrest according as the evidence tends or fails to support the accusation. For the faithful discharge of his duty in these particulars he alone is accountable. He has no divided responsibility with any other officer of the government ; nor is he subject to any other's control.)

The district-attorney may appear before the commissioner, and attend to the presentation of the evidence—but in that position he is only counsel of the government ; he cannot direct what finding the magistrate shall make, nor what course he shall pursue. The magistrate will, indeed, in any case, hesitate to continue an investigation after the prosecution has been abandoned by the legal officer of the government. Still, there may be cases where he will be justified, and more, bound to take such a course.

While the charge is under investigation, before either the commissioner or the grand jury, the district-attorney has no absolute power over the case. His duty

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requires him to attend the sessions of the grand jury ; to advise that body of the law upon points desired ; to examine witnesses ; and, when directed, to draw indictments. But he cannot control the action of that body, and, by declaring that the government will not prosecute any particular case, prevent its consideration. The duty of that body is to inquire into all matters charged to be offenses against the United States, committed or triable in the district, and its power is in this respect unlimited.

It is only at a later stage of the proceedings that the prosecution comes entirely under the direction of the district-attorney. After indictment found and until trial commenced, his authority may be said to be absolute. He can then abandon the prosecution at his pleasure. He can enter a *nolle prosequi*, even without the consent of the court. He can do this before the arraignment of the accused ; or he may do it after issue joined ; he can do it at any time until the jury is impaneled ; and after the trial has commenced he can do it with the consent of the defendant. Having power to this extent over the prosecution after indictment found, it might seem to be a matter of little practical importance, whether the proceedings terminate at his instance before the commissioner, or subsequently by a *nolle prosequi* before the court. But the question is not as to what course the prosecuting attorney of the government may subsequently pursue in case his direction to the commissioner is disregarded, but how far that officer is bound to act upon the direction ; and we are clear that he must act upon his own judgment of the law and evidence, and not upon that of any other person. And it is important that each officer of the government should take his appropriate share of responsibility, without reference to the possible action of others.

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Matter of Lady Bryan Mining Co.

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MATTER OF THE LADY BRYAN MINING  
COMPANY.

*Circuit Court, Ninth Circuit ; District of Nevada,  
October T., 1870.*

CORPORATIONS. — POWER TO PETITION IN BANK-  
RUPTCY.

The trustees of a stock corporation have not power to direct the filing of a petition to have the corporation adjudged a bankrupt. That power is vested in the shareholders.

Where the act of a register in adjudging a petitioner a bankrupt is void at the time when made, for want of authority in the mover of the petition to present it, it cannot be sustained by a ratification, on the part of the petitioner, of the presentment.

Petition to reverse an order denying a motion to vacate an order adjudging a petitioner in voluntary bankruptcy a bankrupt.

The Lady Bryan Mining Company was a corporation organized under the laws of Nevada, and carrying on the business of mining in Storey county. On August 15, 1870, their board of trustees, at a meeting thereof, authorized George W. Hopkins, the secretary of the company, to file a petition for the purpose of having the company adjudged a bankrupt. The petition was filed pursuant to such authority on August 17. Thereupon, and prior to August 31, the register adjudged the corporation to be a bankrupt.

On August 29, the board of trustees called a stockholders' meeting, to be held at Virginia City, on the 31st of that month. A meeting of the stockholders was held on that day, at which four stockholders, repre-

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senting thirteen thousand three hundred and eighty-nine shares, were present. At this meeting a resolution was passed ratifying the action of the secretary in filing the petition and of the register adjudging the company a bankrupt.

The total number of shares in which the capital stock of the company was divided, is eighteen thousand.

A motion was afterwards made, by Ely Johnson, a creditor having a lien by attachment upon the property of the corporation, to vacate the order.

Upon these facts the district court held :

1. That the board of trustees had no power to authorize the secretary to file the petition, and that such filing gave the court no jurisdiction to adjudge the corporation a bankrupt.

2. That the only reasonable construction of the words "majority of corporators" in section 37 of the Bankrupt Act, is to so interpret them as to enable the holders of a majority of the shares of the capital stock to authorize the filing of a petition under that section.

3. That when a corporation seeks to avail itself of the provisions of the bankrupt act it can do so only in the mode prescribed by the act ; and that the petition in bankruptcy can only be filed by authority of the corporators holding a majority of the shares of stock, given at a legal meeting called for that express purpose.

4. That where, as in this case, the commencement of proceedings is unauthorized and void, no subsequent ratification by the corporators can make the proceedings valid.

And an order was made vacating the adjudication.

After the entry of this order in the district court, a petition was filed by the corporation in the circuit court praying that it might be reversed.

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SAWYER, J., in affirming the order of the court below, said :

I am satisfied that the action of the district court, in vacating the order of the register in bankruptcy, was correct. The petition in bankruptcy was filed without proper authority, and the register acquired no jurisdiction. The petition, under section 37, must be "duly authorized by a vote of the majority of the corporators, at any legal meeting called for the purpose."

No other petition on behalf of the corporation can be recognized under the act. A "corporator," as understood both in the law respecting corporations, and in common speech, is "one who is a member of a corporation." *Bouv. L. Dic.* and *Webster's Dic.* That is to say, one of the constituents, or stockholders, of the corporation. I do not know that the word has ever been used in any other sense.

We do not know what motive induced the limitation to corporators, but, probably, it was supposed that, in a matter of so much importance, the constituent members of the corporation ought to be consulted. Whatever the motive, this is the provision of the act, and we are not authorized by a strained or fanciful construction to make it something else. It is the province of courts to interpret, and not to make statutes. The management of the ordinary business of corporations in the State of Nevada, by the provisions of the statutes of the State, has been committed to a board of trustees, but it does not follow that the trustees may authorize the filing of a petition in bankruptcy, under the act of Congress. Congress has power to pass a general bankrupt act, and to prescribe the conditions upon which the benefits of the act may be attained, and the mode of procedure for their attainment; and when prescribed, these conditions must be complied with. It is no interference with the State laws respecting cor-

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porations, to require the consent of the corporators in person, rather than of the board of trustees, as a condition precedent to the filing of a petition in bankruptcy. And this condition has been imposed by the bankrupt act. For this purpose the action of the board of trustees cannot be regarded as the action of the corporators. The corporators themselves must act in a meeting "called for the purpose."

I am, also, of opinion that the act of the register being void for want of jurisdiction, at the time the order was made, a subsequent ratification by the stockholders could not render it valid. It is not a matter of agency, so far as the authority of the register is concerned, but of jurisdiction.

The petition itself shows the authority upon which it was filed, to be a resolution passed by the board of trustees, and, consequently, the want of due authority and of jurisdiction appeared upon the face of the record.

The petition must be denied, and the order of the district judge affirmed.

Order accordingly.

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## UNITED STATES v. MARKS.

*Circuit Court, Sixth Circuit ; District of Kentucky,  
May T., 1869.*

## CONSTITUTIONAL LAW.—PENSIONS.

Sections 12 and 13 of the pension act of July 4, 1864, 13 *Stat. at L.* 887,—which prescribe the fees of agents employed to collect pensions, and impose a penalty for receiving a greater fee than such as is prescribed,—are not unconstitutional. The power to secure to the pensioner the receipt of the pension granted, free of unreasonable tolls or exactions, is incident to the undeniable power of Congress to grant pensions.

By the express terms of the pension act of July 4, 1864, 13 *Stat. at L.* 887, the penalty imposed by section 13 upon a pension agent, for receiving greater fees than are prescribed by section 12 for services in collecting pensions, is incurred only where the fee is received for conducting a claim preferred *under that act*. It cannot be enforced against one who has received an excessive fee for services in collecting a pension given under another act of Congress,—*e. g.*, the act of July 4, 1862, 12 *Stat. at L.* 566.

The pension acts of 1862 and 1864, considered in connection ; and the effect of the latter upon the former, construed and explained.

Motions in arrest of judgment upon an indictment, and for a new trial.

The defendants, Bernet Marks and Nathan Bersinger, were tried and convicted upon an indictment for receiving excessive fees for services as pension agents ; and these motions were now made in their behalf.

*James Speed, and O. F. Stirman, for the motions.*

*Benj. H. Bristow, District-Attorney, opposed.*

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BALLARD, J.—The defendants having been found guilty by a jury, the case is now before me on a motion in arrest of judgment, and also on a motion for new trial.

At common law these two motions could not be made at the same time ; but it has been long the practice in this State to make and hear them together ; and, as there has been no objection interposed here to this course being taken, I shall proceed to consider the motions as if they were entirely regular.

Two grounds are relied on in support of the motion in arrest of judgment :

First. That the indictment is defective in not setting forth any offense under the statute on which it is founded.

Second. That the statute itself is unconstitutional.

The indictment contains four counts. Some of them may be defective ; but the rule is well settled that, if any one is sufficient, it will support the judgment of the court upon the verdict.

The counsel for the defendants have established to my entire satisfaction that the first and second counts are bad, but they concede that the third and fourth are substantially good. I shall, therefore, not examine these counts critically, but, for the purpose of this case, assume them to be sufficient in form and substance, and proceed to inquire into the constitutionality of the act on which they are founded.

These counts are founded on sections 12 and 13 of the act of Congress, approved July 4, 1864, entitled "An Act supplementary to an act entitled An Act to grant pensions," approved July 14, 1862 (13 *Stat. at L.* 387). Section 12 prescribes "the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty," &c., and section 13 imposes a penalty on "any agent or attorney who demands or receives any

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greater compensation for said services" than is prescribed in section 12.

The power of Congress to grant pensions and bounties is not denied by the learned counsel of the defendants, nor is it in my opinion deniable. But counsel insist that when the pension is granted, the sum which the claimant may agree to pay to his attorney for preparing the papers necessary to establish his claim, must rest entirely in contract, and that any attempt by Congress to regulate it, not only intrenches upon the right of the States to regulate contracts between citizens, but is an unconstitutional invasion of the liberty of the citizen.

True, under our form of government, the power to regulate the obligation and the mode of enforcing contracts generally, belongs to the States. But it seems to me undeniable, that if Congress may grant pensions they may secure to the pensioner the pension granted. The power to do the one necessarily implies power to do the other.

The powers of Congress for the protection of both persons and things are coextensive with their powers of legislation. There is, therefore, no right which they may grant, nor any person they may commission, that may not be protected by such laws as Congress may devise, provided they are such as are not expressly prohibited by the constitution. Without powers co-extensive with these here assumed, it seems to me that the government of the United States is no government at all, for, certainly, that is not a sovereign government which is obliged to leave to some other government the protection of either rights granted by it or persons acting under its authority. The United States, then, are not obliged to leave their pensioners,—objects of their peculiar care,—to such protection only as the State laws may prescribe in the matter of procuring their pensions. If they may provide for the

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support of the meritorious soldiers and sailors, who, in consequence of wounds received in the service of the country, have lost all capacity to support themselves,—if they may provide for the maintenance of the widows and helpless children of those who have lost their lives in battle, surely it is their right and their duty to guard, by all suitable laws, the fund thus devoted from being diverted from its object, by either the craft or the extortion of unscrupulous agents.

I do not care to pursue the subject further, for it is now universally admitted that, when Congress have power over any given subject, they have all the power over that subject which properly belongs to any sovereign government; that if the end be legitimate, all the means which are appropriate and adapted to the end are likewise legitimate, and may be applied and used by Congress in their discretion.

The objection that the statute is unconstitutional, because it interferes with the liberty of the citizen, I do not comprehend. All laws, in a certain sense, restrain that liberty which the individual is supposed to possess in a state of nature. The very idea of government involves control—restraint. True, governments are not instituted for the purpose of restraining men in their liberty, but for their protection; but, as protection can generally be found only through restraint, the large mass of the laws of all governments do regulate and restrain the conduct of the citizen. The particular design of the statute now under consideration is not to restrict the citizen in disposing of what is his own, but, by guarding the ignorant against the craft of the cunning, and the needy against the extortions of the rapacious, to secure the bounty of the government to the real objects of its care. Upon the whole, as I have no doubt of the constitutionality of the statute in question, the motion in arrest of judgment must be overruled.

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I am supported in this opinion, by the express decision of the learned district judge of the Western District of Michigan, *United States v. Fairchilds*, 1 *Abb. U. S.* 74, and by the reasoning of the supreme court in the case of *McCulloch v. Maryland*, 4 *Wheat.* 316.

I proceed to consider the motion for a new trial. There is but one ground assigned which need be noticed, and that is that the averments of this indictment were not sustained by the evidence. In considering this question, reference must be had to the provisions of the act of Congress, to the allegations of the indictment, and to the evidence.

Section 12 of the act of July 4, 1864, provides: "That . . . the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty, and other allowance before the pension office *under this act*, shall not exceed the following rates: "For making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the pension office, with the requisite correspondence, ten dollars; which sum shall be received by such agent or attorney in full, for all services in obtaining such pension, and shall not be demanded or received, in whole or in part, until such pension shall be obtained; and sections 6 and 7 of an act entitled 'An Act to grant pensions,' approved July 14, 1862, are hereby repealed."

"Section 13 provides: That any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his services *under this act*, than is prescribed in the preceeding section of *this act*, or who shall contract or agree to prosecute any claim for a pension, bounty, or allowance under this act on the condition that he shall receive a per centum upon any portion of the amount of such claim, or who shall wrongfully withhold from a pensioner or other

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claimant, the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be deemed guilty of a high misdemeanor, and upon conviction thereof, shall, for every such offense, be fined not exceeding three hundred dollars, or imprisoned at hard labor not exceeding two years, or both, according to the circumstances and aggravation of the offense."

The indictment charges, in substance, that Catharine Fitzgerald had a claim and was entitled to a pension under the act of Congress of July 4, 1864; that she employed the defendants as her agents and attorneys, to make out and cause to be executed the papers necessary to establish her claim for a pension under said act; that they did make out the papers necessary to establish said claim; and that they unlawfully demanded and received for their services in making and causing the papers to be executed, a sum of money greater than the compensation prescribed in section 12 of the act of Congress aforesaid, to wit, the sum of forty-one dollars and eighty-seven cents. The evidence showed that Catharine Fitzgerald is the widow of Thomas Fitzgerald, a private regularly enlisted and mustered into the army of the United States, and who died in 1863, of disease contracted while in the service of the United States, and in the line of duty. It thus appeared, that she was entitled to a pension under the second section of the act of July 4, 1862, entitled "An Act to grant pensions," 12 *Stat. at L.* 566, and the evidence showed that she claimed the pension allowed by this act and no other, except the increased pension allowed by the act of July 25, 1866, 14 *Stat. at L.* 230, on account of the pensioner having children under the age of sixteen years.

There was no evidence that she claimed any pension allowed by the act of July 4, 1864, or that she employed the defendants to assert any claim, or that they per-

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formed any services under that act, unless it can be maintained, as the district-attorney contends, that the acts of July 14, 1862, and of July 4, 1864, are one act, and that a pension granted by the act of 1862, is, in contemplation of the law, granted by the supplementary act of 1864, and, consequently, that services performed in making out the papers necessary to establish a claim for a pension allowed by the act of 1862, are, if performed after July 4, 1864, in contemplation of law performed under the act of that date, and subject to the restrictions contained in it.

It will be seen by reference to the act of 1862, that it grants pensions to various persons; that, in section 6, it prescribes the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension . . . "before the pension office *under this act*," and that in section 7 it denounces a penalty against "any agent or attorney who shall directly or indirectly demand or receive any greater compensation for his services *under this act*, than is prescribed in the preceeding sections of this act."

It will also be seen, by reference to the supplementary act of 1864, that it grants pensions to several persons or classes of persons not enumerated in the act of 1862; that, in section 12, it prescribes "the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension . . . before the pension office *under this act*," and that, in section 13, it denounces a penalty against "any agent or attorney who shall, directly or indirectly, demand or receive any greater compensation for his services *under this act* than is prescribed in the preceding section of this act."

There is nothing in the provisions of the act of 1864, as thus cited, at all inconsistent with those cited as part of the act of 1862, and there is no doubt that but for the

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express repeal of sections 6 and 7, found in the latter part of section 12 of the act of 1864, the fees prescribed by section 6 and the penalties for excessive fees prescribed by section 7 of the act of 1862 would apply to all pensions granted by *that* act, and that the fees prescribed by section 12 and the penalties for excessive fees prescribed by section 13 of the act of 1864 would apply only to pensions granted by the latter act.

The words "*under this act*," employed in both statutes, are extremely explicit, and leave no room for construction. They restrict, as plainly as language can, the operation of the provisions with which they are respectively connected to the particular act in which they are found. Nor can the fact that sections 6 and 7 of the act of 1862 are expressly repealed by the last clause of section 12 of the act of 1864 operate to enlarge the preceding provisions of the same section. These provisions, we have already seen, are unambiguous. By the plainest possible language they prescribe the fees of agents and attorneys making claim to or obtaining a pension granted by the act of 1864, and not by any other act. And it is impossible to conceive that the meaning is in the slightest degree modified or changed by the further provisions that sections 6 and 7 of an act entitled "An Act to grant pensions," approved July 14, 1862, "are hereby repealed."

The effect of this repeal cannot be to extend the preceding provisions of the section in which it is found, or the provisions of the succeeding section, to matters to which they plainly do not relate; but its effect is to strip the pensions enumerated in the act of 1862 of all the guards thrown around them by the provisions of sections 6 and 7 of that act. Henceforward there is not only no limit to the fee which an agent may demand for making out and causing to be executed the papers necessary to establish a claim for a pension under the act of 1862, and, consequently, no

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penalty for demanding an excessive fee, but all pending prosecutions for violations of the act of 1862—occurring even prior to July 4, 1864—must fail, because it is well settled that no prosecution can be supported by a repealed statute.

But, as already intimated, the district-attorney contends that the acts of 1862 and of 1864 are to be read as one act ; that the act of 1864 is to be regarded as a re-enactment of the act of 1862, omitting only the repealed parts ; and that, in fact, this is the legal effect of every amendatory or supplementary statute. In support of his position, he refers to the case of *The Harriet*, 1 *Story C. Ct.* 251.

It is undoubtedly true, that where a statute is amended, the original statute is thenceforward to be read (striking out of it all of the repealed and incorporating into it all of the amended provisions) precisely as if the original statute was re-enacted, omitting the repealed and inserting in their appropriate places the amended provisions. But this rule will not allow the incorporating into or reading as part of the original act, a provision of the supplementary act, which, by its terms, plainly refers to the supplementary act only, and which has complete sense and operation without reference to the original act at all. Now, undoubtedly, the provisions of sections 12 and 13 of the act of 1864 are not without operation if they are confined, as their terms require, to the pensions granted by the act in which they are found, and, therefore, there is no rule of interpretation which requires or permits them to be incorporated into and read as part of the act of 1862. If the act of 1862 be now read, striking out of it all that is repealed by the act of 1864, and inserting into it all that is amendatory, still we cannot read as part of it sections 12 and 13 of the act of 1864, because they do not relate to it, except as they repeal some of its provisions. The whole effect of the provisions of sections

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12 and 13 of the act of 1864 on the act of 1862, is to require that henceforward the act of 1862 be read with sections 6 and 7 omitted.

Again, the district-attorney contends that in the construction of statutes, the intention of the legislature must prevail ; that it is unreasonable to suppose Congress, by the act of 1864, *intended* to prescribe the fees of the attorneys for making claim to only the very few pensions granted by that act, and to leave the fees of the same attorneys for making claim to the numerous pensions granted by the act of 1862 wholly unlimited. But I have no means of ascertaining the intention of Congress, except from what they have said. I have no right, upon any conjectures of policy which I may entertain, to supply an intention which cannot be derived from the language employed. I am obliged to take the statute just as it is written, and to adopt that construction which its language plainly imports. I cannot stretch it to cases obviously not embraced by its terms, because such cases seem to me to be included in the policy.

Congress have plainly declared that it shall not be lawful for attorneys making claim to pensions *under the act of 1864*, to demand or receive more than a prescribed compensation ; but should the court conjecture that some other act not expressly forbidden—that a demand of more than the compensation fixed by the act of 1864 for making claim to pensions *under the act of 1862*—ought to be punished, for the purpose of effecting a supposed legislative intention, “it would” (as Judge MARSHALL said, in the case of *The Paulina’s Cargo*, 7 *Cranch*, 61), “certainly transcend its own duties and powers, and would create a rule, instead of applying one already made. It is the province of the legislature to declare in explicit terms how far the citizen shall be restrained, . . . and it is the province of the court to apply the rule in the case thus explicitly de-

scribed—not to some other cases which judges may conjecture to be equally dangerous.”

Moreover, the district-attorney is obliged to concede, and does concede, that for all violations by agents or attorneys of the act of 1862, occurring prior to the act of July 4, 1864, there could be no punishment after the latter date; because, by the act of that date, the penal provisions of the former act were repealed. But no well grounded reason can be assigned why Congress should *intend* to relieve these violators, that does not apply with equal force to all like offenders. Why should we presume that Congress *intended* that an attorney who demanded, in August, 1864, a fee of twenty dollars for making claim to a pension, allowed by the act of 1862, should be punished, when they have, by explicit legislation, declared that an attorney who demanded and received such fee for similar service in August, 1862, shall not be punished?

Still, I can hardly doubt that Congress did not in fact *intend* to deprive the beneficiaries under the act of 1862 of the protection sought to be given by sections 6 and 7. I cannot, however, sitting here as a judge, say they did not intend to do what they have plainly done. I may conjecture that *they* overlooked the effect of the language used in sections 12 and 13 of the act of 1864, but I can neither overlook nor disregard it. I cannot supply the omission of the legislature, for it is a fundamental rule “that a penalty cannot be raised by implication, but must be expressly created and imposed.” *Jones v. Estes*, 2 *Johns*. 379.

It follows, that as the indictment describes the offense as committed in reference to a claim under the act of 1864, when the evidence shows it has reference to a pension claimed under the act of 1862, there is a variance between the allegation and the proof which entitles the accused to a new trial. But this right to a new trial may be rested upon the still broader ground,

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that the penal provisions of the act of 1862 having been repealed by the act of 1884, the evidence fails to show that they are guilty of any offense whatever.

A new trial must be granted.

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### GRAY v. LARRIMORE.

*Circuit Court, Tenth Circuit; District of California,  
June T., 1885.*

#### JUDGMENT.—JURISDICTION.—PARTIES IN EQUITY.

The jurisdiction of any court over either the person or the subject matter, may be inquired into whenever any right or benefit is claimed under its proceedings; and want of jurisdiction will render its judgment unavailable for any purpose.

In applying this rule, the only difference recognized between courts of superior and of inferior jurisdiction, is that, with reference to courts of superior or general authority, jurisdiction is presumed until the contrary appears; but with reference to courts of inferior or limited authority, the jurisdiction must be affirmatively shown by parties who claim any right or benefit under their proceedings.

The presumption in favor of the judgments of superior courts, is limited to jurisdiction over persons within their territorial limits, and to proceedings in accordance with the common law. If it appears, either from the record or by evidence outside, that the defendants were, at the time of the alleged service upon them, beyond the reach of the process of the court, or when the proceeding was not one in accordance with the common law, the presumption ceases, and the burden of establishing the jurisdiction over them is thrown upon the party who invokes the benefit of the judgments.

As a statute authorizing a suit to be commenced against a non-resident by means of service by publication is in derogation of the common law, its provisions must be strictly pursued, in order to sustain a

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judgment in the subsequent course of the suit so commenced. A failure to comply with any of the requirements of the statute will be fatal to the judgment, unless cured by voluntary appearance.

The requisites prescribed by the laws of California, to obtain an order for the service of the summons in a civil action, by publication, and the proofs required to show such service,—stated and considered, in a cause involving the rights of a purchaser under the judgment as against the defendant, suing, after reversal of the judgment, to recover back the property sold under it.

The general doctrine of courts of equity, relative to absent parties, is, that if persons out of the jurisdiction are merely passive objects of the judgment sought, or if their rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. But if such absent persons are to be active in the performance or execution of the decree; or if they have rights wholly distinct from those of the other parties; or if the decree ought to be pursued against them; then the court cannot properly proceed, without their being made parties. And the suit, so far at least as their rights and interests are concerned, should be stayed; for, to this extent, it is unavoidably defective.

All the partners, or their representatives, are indispensable parties to a bill filed to procure a dissolution of the copartnership and an account.

Where, upon a bill filed in a circuit court to procure a dissolution of copartnership and an account, one of the partners (or his representative) is not a resident of the State in which the suit is commenced, and cannot be served with process therein, the suit is defective, and cannot proceed, unless service by publication is authorized by the law of the State, and is made in strict conformity therewith; or unless there is a voluntary appearance.

Trial of issues by the court.

This was an action to recover the possession of land in San Francisco, and was brought by Matilda C. Gray and Franklina O. Gray (an infant suing by next friend) against Richard Larrimore and others. The facts immediately material to the decision are stated in the opinion of the court.\*

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\* See, also, *Gray v. Brignardello*, 1 *Wall.* 627.

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FIELD, J.—This is an action to recover the possession of certain real property situated within the city of San Francisco, and the rents and profits of the same, withheld from the plaintiffs. It is tried by the court without the intervention of a jury, pursuant to a stipulation of the parties, under a recent act of Congress.

Both parties claim title from the same source—from Franklin C. Gray, deceased, who died intestate in July, 1853, possessed of a large property, real and personal. Of the real property the premises in controversy are a portion. The deceased left surviving him a widow, Matilda C. Gray, and a posthumous child, Franklina C. Gray, and, by the statute of descents and distributions of California, they inherited his entire estate in equal shares.

The defendants claim title to the premises by virtue of a sale and deed, made under a decree rendered in an action in the district court of the State, to which the widow and child are alleged to have been parties. It is upon the validity of this decree, and consequent sale and deed, that the case must turn. The action in which the decree was rendered arose in this wise: In February, 1854, William H. Gray, a brother of the deceased, instituted a suit in equity, in the district court of the State, against Joseph C. Palmer and Cornelius J. Eaton, who had been appointed administrators of the estate of Franklin C. Gray, and against the widow, Matilda, and one James Gray. Subsequently the child Franklina was made a party defendant. In his bill the complainant alleged that a copartnership had existed between him and his brother since 1848, and that it embraced all their business and all their purchases of real property, although the titles were taken in the individual name of the deceased. The partnership stated was both universal and dormant, the interest of the complainant extending to one-third of all acquisitions of every kind and description of both co-

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partners. The object of the bill was to settle up the affairs of the alleged copartnership and obtain a decree for the one-third claimed by the complainant.

In January, 1855, Cornelius J. Eaton, who had been a clerk of the deceased, who, as administrator, was made a defendant in the above action of Gray, resigned his trust, and instituted a suit in equity, in the district court of the State, against Palmer, the remaining administrator, and against the widow and child. In his bill he also alleged that a copartnership had existed between himself and the deceased; that it commenced in January, 1851, and embraced all the property, real and personal, of both, and all their business, and that his interest extended to one-fourth of the property possessed at the time, and all future acquisitions. The object of the suit was to settle up the affairs of the alleged copartnership, and to obtain a decree adjudging to the complainant the one-fourth part of the estate claimed.

The amendment to the bill in the suit brought by Gray, by which the child Franklina was made a party, alleged that she was absent from the State, and resided with her mother at Brooklyn, in the State of New York. The bill filed by Eaton averred that the child was not a resident or a citizen of California, but was a resident and citizen of the State of New York or of the District of Columbia. Service of summons upon her was therefore attempted by publication in both cases. When, as was supposed, the service had been in this way effected, a guardian *ad litem* for the child was appointed by the court in both cases. The appointment was made in each case upon the petition of the complainant. The other defendants appeared by attorneys and answered.

On October 23, 1855, upon the stipulation of the guardian and the attorneys of the other defendants, the two actions were consolidated into one. Four

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days subsequently a decree was entered in this consolidated action, and it would seem from the certificate of the judge of the court appended to the decree, that it was entered without trial, upon the consent and agreement of the parties. By this decree it was adjudged that a partnership had existed between Eaton and the deceased, which embraced all the property, real and personal, and all the business of both, and that in this partnership Eaton had an interest of one-fourth; that a similar copartnership had also existed at the same time between Gray and the deceased, in which Gray had an interest of one-third; that the latter copartnership was subject to the copartnership of Eaton; and that therefore Eaton should first take one-fourth of the estate, and Gray one-third of the remaining three-fourths, and that the other two-fourths should be equally divided between the widow and child. By the decree a reference was also ordered to a commissioner, to take and state an account of the business, profits, and property of the two copartnerships, with directions, upon the confirmation of his report, to sell all the property of both, and upon the confirmation of the sales to execute proper conveyances to the purchasers.

Upon the statement of the accounts by the commissioner, the deceased was found largely indebted to each of his alleged copartners. Although Gray had been interested, as pretended, in one-third of the property and profits of a universal copartnership with his brother for nearly five years, and had been oftentimes pecuniarily embarrassed in transactions with other parties, and on one occasion, as late as March, 1853, had even borrowed money of his brother, on interest at the rate of three per cent. a month, he had been careful to preserve untouched his proportion of the large sums and property accumulated by the alleged copartnership, and therefore had refrained from drawing any moneys from

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the concern. The deceased, in the meantime, as counsel very pointedly observe, had spent the money of the alleged firm as freely as though it had been his own. Like prudential considerations appear to have governed, except in one instance, the conduct of the alleged partner Eaton during the period of two years and a half. It very naturally turned out, under these circumstances, upon the accounting, that the indebtedness of the deceased to both copartners for the excess over his share, drawn by him from the concern, was large. It was found to be so large that it absorbed the entire portion of the estate which would otherwise have gone to the widow and child. Out of property inventoried in the probate court of San Francisco at two hundred and thirty-seven thousand dollars, there was nothing left for them ; indeed, the estate of the deceased was brought in debt to these alleged universal copartners over thirty-five hundred dollars.

By a decree of the court, bearing date on April 7, 1856, the report of the commissioner was confirmed, and a sale of the entire property, real and personal, of the alleged copartnerships was ordered. Objection was taken to the admissibility of this decree, to which we may hereafter refer. But we shall treat the decree as properly in the case. The sale which it directs was made on May 3, 1856. At that sale the defendant Larrimore became the purchaser of the property in controversy, and subsequently received a deed from the commissioner, and went into possession, and has continued in the possession and use of the premises ever since. The other defendants hold under him.

On appeal to the supreme court of the State, the decree of the district court in the consolidated action was reversed, and it was held that the evidence presented did not warrant the conclusion that a copartnership had existed between William H. Gray and the deceased. The case was accordingly remanded to the

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district court, and afterwards both suits were dismissed.

The plaintiffs then brought the present action of ejectment. The defendants rely, as we have already stated, upon the validity of the decree, in the consolidated action, for the sale of the premises, notwithstanding its subsequent reversal.

On the other hand, the plaintiffs insist that the district court never acquired jurisdiction of the person of the child Franklina by service of summons or by her appearance; and that, in her absence as a party to the proceedings, no valid decree for the sale of the alleged partnership property could pass; in other words, that she was an indispensable party to the ascertainment of the debts, and the settlement of the accounts of the alleged copartnerships and the sale of the property belonging to them. The questions presented, then, are: Was she brought before the court by service of process, or did she otherwise appear in the suits? And if she neither was served nor appeared, was it competent for the court to proceed with the suits in her absence?

It is a familiar doctrine that the jurisdiction of any court over either the person of the defendant or the subject matter, may be inquired into whenever any right or benefit is claimed under its proceedings. The want of jurisdiction will render its judgments and decrees unavailable for any purpose. *Borden v. Fitch*, 15 *Johns.* 140; *Williamson v. Berry*, 8 *How.* 541. The doctrine is as applicable to the proceedings of courts of superior or general authority as it is to courts of inferior or limited authority. The difference between these courts in this respect relates only to the presumptions raised by the law. With reference to courts of superior or general authority, jurisdiction is presumed until the contrary appears; but with reference to courts of inferior or limited authority, the jurisdiction must be affirmatively shown by parties who claim any right or

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benefit under their proceedings. *Mills v. Martin*, 19 *Johns.* 33 ; *Bloom v. Burdick*, 1 *Hill*, 140.

The general presumption indulged in support of the judgments and decrees of the superior courts is, however, limited to jurisdiction over persons within their territorial limits—persons who can be reached by their process—and also over proceedings which are in accordance with the course of the common law. Whenever it appears, either from inspection of the record or by evidence outside the record, that the defendants were, at the time of the alleged service upon them, beyond the reach of the process of the court, the presumption ceases, and the burden of establishing the jurisdiction over them is thrown upon the party who invokes the benefit or protection of its judgments and decrees. So, too, the presumption ceases when the proceedings are not in accordance with the course of the common law. With reference to such proceedings, the superior courts, though in other respects possessing general authority, exercise only a limited and special jurisdiction.\*

In the bills of complaint in the two actions of Gray and Eaton, the absence of the infant Franklina from California, and her residence in another State, are alleged. The presumption of jurisdiction over her person by the district court is thereby repelled, and it remains for the defendants to show that by means provided by the statute in such cases, the jurisdiction

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\* In *Allen v. Blunt*, 1 *Blatchf. C. Ct.* 487, it was held by Mr. Justice NELSON, that the record of a judgment in the circuit court of the United States must show affirmatively that the defendant was served with process within the district where the suit was brought, or the judgment will be void. See, also, *Shumway v. Stillman*, 4 *Cow.* 292 ; and *Bissell v. Briggs*, 9 *Mass.* 469.

*Hallet v. Righters*, 13 *How. Pr.* 43, 46 ; *Kendall v. Washburn*, 14 *Id.* 331 ; *Titus v. Relyea*, 16 *Id.* 371, 373 ; *Zecharie v. Kerr*, 3 *Smedes & M.* 645 ; *Harris v. Hardeman*, 14 *How.* 343. See, also, *Thatcher v. Powell*, 6 *Wheat.* 127.

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was acquired. The statute substitutes, in case of a non-resident and absent defendant, constructive service, by publication of the summons, in place of personal service ; and it designates the facts which must appear to authorize an order for the publication, the period for which the publication must be made, and the manner in which such publication must be proved. The statute is in derogation of the common law, and its provisions must be strictly pursued. A failure to comply with any of the particulars stated, will be fatal, unless cured by the voluntary appearance of the party.

In the first place, to obtain the order it must appear, by affidavit, to the satisfaction of the court or the judge, that the defendant is at the time a non-resident, or absent from the State ; and that the plaintiff has a cause of action against him, or a cause of action for the complete determination of which he is a necessary or proper party. Until these facts appear—not by the complaint, but by affidavit—no order can be legally issued. “In granting the order,” says the supreme court of the State in a recent case, “the court or judge acts judicially, and can know nothing about the facts upon which the order is to be granted, except from the affidavit presented by the applicant. There is no other way of bringing the fact of residence to the judicial knowledge of the court or judge.” *Ricketson v. Richardson*, 26 Cal. 149 ; *Pract. Act*, § 30. In the second place, the order must direct the publication to be made in a newspaper to be designated as most likely to give notice to the defendant, and the publication must not be less than three months.\* If the residence of the non-resident or absent defendant be known, the order must also direct a copy of the summons and complaint to be forthwith deposited in the post-office, addressed

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\* “Calendar and not lunar months are meant.” *McMillan v. Richards*, 9 Cal. 374, 405, 420.

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to him at his place of residence. *Pract. Act*, § 31. And in the third place, proof of such service must be made "by the affidavit of the printer or his foreman or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office, if the same shall have been deposited." *Pract. Act*, § 32.

Tested by these provisions of law, the proceedings to secure service by publication and the proof of publication were defective in essential particulars:

1. There was no affidavit presented to the court in either case, when the order was obtained. The action of the court, so far as the record discloses, may have been taken in each case upon the verbal statement of the plaintiff or of his counsel.

2. In the case of *Eaton v. Palmer*, there was no affidavit or other proof of publication; and in *Gray v. Eaton* the affidavit did not show that the affiant was either "the printer or his foreman or principal clerk." It merely described himself as being the clerk; it did not state such to be the fact. This description was not a compliance with the requirements of the statute. The authorities are uniform on this point. In the recent case of *Steinback v. Leese*, 27 *Cal.* 295, in the supreme court of the State, the precise question was considered and determined. There the affiant described himself as principal clerk in the office of the newspaper in which the publication was made, but did not aver that such was his position in fact, and the court held that the affidavit was fatally defective; that by the statute the only persons competent to testify as to the publication, are the "printer or his foreman or principal clerk;" and that the affiant is one of them, is of itself, a substantive fact, which must be proved as such, before the court can proceed to render judgment. *Staples v. Fairchild*, 3 *N. Y.* (3 *Comst.*) 43; *Payne v. Young*, 4 *N. Y.* (4 *Seld.*) 158.

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There was an attempt made to supply the omission of the affidavit, by evidence at the trial that the affiant was in fact the principal clerk of the printer ; but such evidence was clearly inadmissible. The statute prescribes the character of the evidence which shall be produced, and by whom it shall be given. It is not sufficient that other proof equally persuasive and convincing may be offered. The statutory proof will alone suffice.

If the omission could be remedied at all at this late day, which is very questionable, it could only be done by the direct action of the court to which the record belongs. It is not competent for this court to receive parol testimony to supply the omission. *Noyes v. Butler*, 6 Barb. 617 ; *Lowry v. Cady*, 4 Vt. 506.

The defects stated are decisive upon the question whether the district court ever acquired jurisdiction over the person of the infant Franklin. As to her, the alleged record of that court is no record. The position urged by counsel, that the mother, as the natural guardian of the infant, had the right to appear for her without service on her, does not require consideration, for no such appearance was made or attempted. The guardian *ad litem* for the infant was appointed upon the application of the plaintiff in each case. But were it otherwise, the result would be the same. There can be no appearance of the infant until a guardian *ad litem* is appointed, and no such appointment can be made until service on the infant is effected. *Gray v. Palmer*, 9 Cal. 628. The appearance of the mother on her own behalf, or any request by her attorney for the appointment of a guardian, could not dispense with the service.

The infant not having been brought into court, the next inquiry is as to the effect of the proceedings and decree upon the interests of the widow Matilda.

The object of the two actions of Gray and Eaton,

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and of course of the consolidated action, was, as already stated, to settle up the affairs of the alleged copartnerships, and to obtain a distribution of the effects and property of the copartners according to their respective interests. To these actions, the deceased, had he been living, would have been an indispensable party, their aim being to dispose of property the title to which stood in his name, and of which he was apparently the sole owner. Any decree therein distributing or selling the property without his presence would have been a nullity, a confiscation of his rights without his day in court—a simple act of judicial usurpation. The same necessity which would have required the presence of the deceased, had he been living, exacts the presence of those who, upon his death, became clothed with the title and apparent ownership of the property. To reach the property, and give the court authority to interfere with it, and divest the owners of their title by ordering a sale, it was necessary to establish the existence of the alleged copartnerships, and that there were debts owing by them. Both of these facts were essential to the jurisdiction of the court, and the foundation of the entire proceedings. The establishment of either of them necessarily affected, to the same extent, the interests of both the widow and child. If the copartnerships existed they embraced the property claimed by both; they could not exist with reference to the interest which descended to the widow, and not also exist with reference to the interest which descended to the child. They embraced the whole interest in the property,—not an undivided interest. Therefore, no valid determination of the fact of copartnership could be made against the widow which would not be equally valid against the child; and if no valid determination could be made against the child, she not being brought into court, there could be none against the widow. The fact of copartnership being

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established, its operation upon the copartnership property was incapable of division or abridgment.

The same objections apply to the debts alleged to be owing by the copartnerships. If they were legally established, they become liens, not upon the interest of the widow alone, but upon the entire property.

The conclusion which follows from these views is, that the child Franklina was an indispensable party to any valid adjudication of the facts of partnership and debt, and consequently to any binding decree for the sale of the alleged copartnership property.\*

The doctrine of equity, when some of the parties are out of the jurisdiction of the court, is well stated by Mr. Justice STORY, in his *Equity Pleadings*, sections 81, 82, and 83. After commenting upon the general rule that all persons legally or beneficially interested in the subject matter of a suit in equity should be made parties, and stating an exception with reference to persons without the jurisdiction, who cannot consequently be reached by the process of the court, the learned justice says: "It is an important qualification engrafted on this particular exception, that persons who are out of the jurisdiction, and are ordinarily proper and necessary parties, can be dispensed with only when their interests will not be prejudiced by the decree, and when they are not indispensable to the just ascertainment of the merits of the case before the

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\* See *Barney v. Baltimore City*, 6 *Wall.* 284; *Shields v. Barrow*, 17 *How.* 139, 140, 141; *Cameron v. McRoberts*, 3 *Wheat.* 591; *Mallow v. Hinde*, 12 *Id.* 198.

In the case of the Fourth National Bank of the City of New York v. New Orleans & Carrollton R. R. Co., recently decided by the supreme court of the United States, it was held unanimously that in a suit for the settlement of the accounts of a copartnership, all the copartners were indispensable parties; and that no decree therein could be rendered until all the partners were made parties; and, that if this was impossible, and a decree could not be made without prejudice to one not a party, the suit must be dismissed. 11 *Wall.*

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court. The doctrine ordinarily laid down on this point is, that when the persons who are out of the jurisdiction are merely passive objects of the judgment of the court, or their rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. But if such absent persons are to be active in the performance or execution of the decree ; or if they have rights wholly distinct from those of the other parties ; or if the decree ought to be pursued against them ; then the court cannot properly proceed to a determination of the whole cause without their being made parties. And, under such circumstances, their being out of the jurisdiction constitutes no ground for proceeding to any decree against them or their rights or interests ; but the suit, so far at least as their rights and interests are concerned, should be stayed ; for to this extent it is unavoidably defective. In many instances, the objection will be fatal to the whole suit."

The case of a bill brought by one partner against several other copartners, one of whom was out of the jurisdiction, praying for an account and dissolution of the copartnership, is given by STORY in illustration of this last position; that the objection will sometimes be fatal to the whole suit, for "the absent partner," says the justice, "would have a distinct and independent interest, and would seem to be an indispensable party, since the decree must affect that interest, and indeed would pervade the entire operations of the partnership." The case of *Brown v. Blount*, 2 *Russ. & M.* 83, is also referred to, as illustrating the same position. In that case a judgment creditor of one Blount had sued out a writ of *elegit* upon his judgment, and had filed his bill to reach certain real estates, which were vested in trustees upon certain trusts, under which Blount was entitled to the rents and profits during his life. The trustees and certain parties interested under

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the trusts, and others having a charge upon the trust estate, were made parties, but Blount was abroad, and had been for years previous to the institution of the suit, and was therefore not made a party. The court held that "Blount being the person whose interests were sought to be affected by the decree, the suit could not proceed in his absence." See, in further illustration of the doctrine stated, *Milford Ch. Pl.* 31, 32; *Inchequin v. French*, 1 *Ambler*, 33; *Fell v. Brown*, 2 *Brown Ch. Cas.* 276; *Beaumont v. Meredith*, 3 *Ves. & B.* 180; *Evans v. Stokes*, 1 *Keen*, 38; *Russell v. Clark*, 7 *Cranch*, 98; *Mallow v. Hinde*, 12 *Wheat.* 194; *Fuller v. Benjamin*, 23 *Me.* 255; *Sparr v. Scoville*, 3 *Cush.* 578.

In *Evans v. Stokes*, the bill was filed to have the affairs of a joint stock company—which was a copartnership—wound up and settled under the decree of the court, and accounts of the partnership property taken, and a sale of some portion of the property made by the directors set aside; and it was held that all of the members of the company, however numerous, must be made parties. "It is perfectly obvious," said the master of the rolls, "that a suit, where all the accounts of the partnership are to be taken, and the rights of all the parties are to be determined, as between themselves, and under the various circumstances in which they stand in relation to each other, some of them, for instance, having paid their calls, and others having omitted to do so, cannot be prosecuted in the absence of any of those parties."

The case of *Fuller v. Benjamin* is equally pointed. In that case four persons had been copartners, two of whom had become insolvent, and were out of the State; the suit was brought by one of the partners against the solvent member. On demurrer for want of parties, the court said: "In cases of partnership it must be difficult, if not impracticable, to proceed in equity,

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without the presence of all the copartners, or their legal representatives. Each must be expected to have claims, either for services rendered or advances made, without the adjustment of which it will be impossible to ascertain what may be due from or to the joint concern by each; or what just claim any one or more of them may have against any one or more of the others. Until such an ascertainment shall have been made it will be impossible to pass a decree, which shall be founded upon the principles of justice, as to their several rights." And again: "The plaintiff in this would seem to be without remedy, either at law or in equity. In *Story on Equity Pleadings*, sections 82, 83, 152, and 218, it is clearly shown, that a court of equity cannot take cognizance of a case in the predicament of the one here exhibited. Although the partners not present are insolvent, yet they are indispensable parties, whose rights might be affected by a decree, and who must be present to be able to afford information as to their own claims in connection with those of the others; and if bankrupts, their assignees should be made parties."

The condition of the alleged copartners, Gray and Eaton, might have been similar to that of the plaintiff in this last case—without relief either at law or in equity—had there not been a provision in the legislation of the State for securing service by publication upon the non-resident infant. As they did not pursue the course pointed out by the statute, their present position with reference to the subsequent proceedings, and the decree rendered is precisely what it would have been, if no such statute had existed.

The principle upon which the several cases cited proceed is fundamental, and underlies the administration of justice in all courts of equity.

The conclusion which we have reached renders it unnecessary to pass upon the objection taken to the

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introduction of the decree of April 7, 1856. The decree has never been produced upon any previous trial of the actions brought by the widow and child ; it is not embraced in the judgment roll of the consolidated action of Gray and Eaton ; it did not form any portion of the record which was presented in that action to the supreme court of the State, or of the record in the recent action of ejectment of Gray against Brignardello before the supreme court of the United States. For nearly nine years the original document, signed by the district judge, has lain unknown in the desk of the commissioner in this city. It appears, also, that subsequently, on May 14, 1856, the decree was amended for some alleged want of conformity to the previous report of the commissioner, and that a new decree was substituted in its place. It may well be doubted whether, under these circumstances, the decree should have been received in evidence ; but, as stated, the question of its admissibility is rendered immaterial from the conclusions reached on other grounds.

The tax deeds produced by the defendant Larrimore do not aid the defense. He was in possession of the premises at the time the taxes were levied and the sales by the tax collector were made, and it was his duty to have paid the taxes. *Moss v. Shea* covers his case—25 *Cal.* 38. Nor did the assessment roll for the years in which the taxes were unpaid show any valuation of the property. *Hurlburt v. Butenop*, 27 *Cal.* 50 ; *Woods v. Freeman*, 1 *Wall.* 398.

As to the rents and profits of the premises since the defendant Larrimore went into possession, there is some conflict in the evidence. Our conclusion is that the premises have been worth to him since May 25, 1856, one hundred dollars a month, and that amount will be found as the monthly rents and profits.

The plaintiffs are entitled to a joint judgment against all the defendants for the possession of the premises in

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controversy, and the plaintiff Franklina to a several judgment against the defendant Larrimore for one-half of the estimated rents and profits from May 26, 1856, and the plaintiff Matilda to a several judgment against him for the remaining half of the rents and profits, commencing three years before the filing of the complaint in the present action ; the rents and profits to be calculated in both cases up to this date.

Judgment accordingly.

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### KELLOM v. EASLEY.

*Circuit Court, Eighth Circuit ; District of Nebraska,  
May T., 1870.*

#### ASSIGNABILITY OF LAND PATENTS.—REQUISITES OF BILL OF REVIEW.

Under section 12 of the act of September 4, 1841, 5 *Stat. at L.* 458, relating to pre-emptions of the public lands,—which provides that “all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void,” a pre-emptioner, though he has a certificate of purchase, cannot, prior to the issue of the patent, convey the land.

Conveyances made by a pre-emptioner before patent issued, are void, and, if he fails ever to obtain a patent, can operate neither by way of grant or estoppel.

A bill of review should state the former proceedings, and wherein the party exhibiting it considers himself aggrieved. The sufficiency of allegations in this respect, considered and decided.

Hearing upon a bill of review.

Harrison Johnson, under the act of September 4,

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1841, 5 *Stat. at L.* 453, pre-empted, and in 1857 entered, by virtue of that act, the premises in question in this suit ; and afterwards, during the latter year, conveyed the premises, by absolute deed with warranty, to one Test, to secure a sum of money borrowed by him from Easley and Willingham, and for which he executed to them his promissory note. Test subsequently conveyed to Willingham. This debt to Easley and Willingham was never paid.

The land thus pre-empted by Johnson was near to, if not partly within the city of Omaha ; and that city contested, before the land department of the United States, at Washington, the validity of Johnson's pre-emption right and entry ; and such proceedings were had that Johnson's entry was vacated and set aside, and the land ordered to be sold at public sale by the local land officers at Omaha. Pending this contest, Johnson was embarrassed with debts, and it is quite probable that the order vacating his entry and directing the sale of the land was made with his consent, if not in part by his procurement.

The officers fixed upon August 18, 1860, as the date of the sale of the one hundred and sixty acres on which Johnson had claimed the pre-emption right. His creditors met with a view to bid upon the land, which, by this time, had become of considerable value. Prior to the sale, a meeting of Johnson and his creditors was held, at which Johnson proposed, in substance, that the creditors should surrender and cancel their claims against him ; that they might then bid in, without opposition from him, eighty acres of this land ; and that his mother should then be allowed to bid in the other eighty acres without opposition from the creditors.

Easley and Willingham, and also one Beers, claiming to be mortgagees, did not consent to this proposition, because the other creditors would not recognize their priority, and insisted that all the creditors should

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stand on an equal footing ; and these mortgage creditors left the meeting before the final agreement was concluded between the assenting creditors and Johnson.

That agreement was reduced to writing on the morning of the day on which the sale was to take place, and was signed by Johnson and nine of his creditors ; the mortgagees and certain other creditors, absent or not assenting, and representing about one-half in amount of Johnson's debts, did not sign the contract, or come into the arrangement. By this contract, the creditors executing it agreed that the principal sum and ten per cent. interest should be the basis for ascertaining the amount due to them severally by Johnson ; three persons were named as "a committee, whose duty it should be to ascertain the just amount due from Johnson on the above basis, which shall be deemed the true amount, and from whose finding there shall be no appeal ;" the creditors were to present their claims to the committee without delay, "with such evidences as they may have of the genuineness thereof, in default whereof the creditors so in default shall be debarred from any benefit under this agreement, and the said Johnson shall be forever discharged from all liability to them, and the benefits which they would have derived shall revert and go to the said Johnson."

By the contract, it was provided also, that Kellom, one of the creditors, should buy in eighty acres in trust for himself and the other creditors, to be divided between the creditors in proportion to the amount of their claims as found due from Johnson to them by the committee in the manner above stated.

The sale took place ; Kellom bought in one eighty acres at the minimum price, and Mrs. Johnson the other at the same price.

One of the creditors, Smith, who signed the agreement, presented his claim, evidenced by a promissory note, to the committee. The committee required of him

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additional evidence of his debt, failing to produce which his claim was not allowed by the committee. It amounted to one thousand and thirteen dollars, and constituted (in round numbers) one-ninth part of the aggregate sum of the claims of all the creditors who signed the contract.

Kellom shortly afterwards conveyed to the creditors who signed the contract, excepting Smith, all of the eighty acres, except the parcel retained by him on account of his own debt. That is to say, the whole eighty was partitioned between Kellom and the other creditors who signed the contract, excluding Smith. In the partition it was considered that Smith had no right, and that Johnson was not entitled to the share that would have fallen to Smith had his debt been recognized by the committee.

Afterwards, in July, 1863, Willingham and Easley filed a bill in equity against Johnson, Kellom, and others, claiming that they were mortgagees of Johnson, by reason of the deed from him to Test, and from Test to Willingham, before mentioned. They also claimed that the contract between Johnson and the creditors was, that the eighty acres bid in by Kellom, were to go to pay *all* of the debts of Johnson, whether the creditors' names were affixed to the contract or not, and that if any of the creditors should not come in, that Johnson was to have such portion of the eighty acres as would have fallen to such, had they acceded to the arrangement; that one-half the amount did not come in, and hence, on this theory, Johnson was entitled to one-half of the land, and they, Willingham and Easley, as mortgagees, were entitled to a decree of foreclosure as against this interest.

Kellom and the other defendants resisted this bill; testimony was taken; the original agreement was not produced, nor any copy thereof; secondary evidence of its contents was given, and at the May term, 1867,

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of this court, a decree was passed sustaining the view of Willingham and Easley, holding that Johnson was entitled to an undivided half of the eighty acres purchased by Kellom, and that Willingham and Easley's mortgage was a lien upon this interest; and subjecting it to the payment of the mortgage debt.

In the November following, Kellom and others (defendants to the original bill), filed the present bill of review, making Easley and Willingham and others defendants thereto.

In the bill of review it was alleged that the decree was erroneous on the face thereof, in certain particulars specified; and it was particularly alleged that the complainants therein had, since the decree was made, discovered, for the first time, a copy of the written contract of August 18, 1860, between Johnson and his creditors, and that this established the agreement to be as they maintained it was, and not to be as found by the decree of the court. Answer was made and testimony taken upon the bill of review. What purported to be a copy of the agreement between Johnson and nine of his creditors was produced; this showed that the contract was made between Johnson and "certain of his creditors," not all of them, and that only those who signed were to be entitled to its benefits. Among others it was signed by the creditor Smith, whose claims the committee rejected, as before mentioned.

The cause was heard before DILLON, circuit judge, and DUNDY, district judge.

Other material facts are stated in the opinion.

*Daniel Gantt*, for complainants.

*J. M. Woolworth*, for defendants.

DILLON, J., delivered the opinion of the court.—

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If Willingham and Easley have no lien on the land which they are seeking to subject to their debt against Johnson, or if Johnson has no interest in this land, in either event their bill to foreclose cannot be maintained.

The first inquiry is : Have Willingham and Easley any lien on the land in question ? The basis of their claim to a lien is the deed from Johnson to Test. Johnson, it will be recollected, pre-empted the land under the act of Congress of September 4, 1841, and after he had entered it, and before his entry was canceled by the department, he made the deed to Test. This deed is absolute in form, and contains covenants of warranty. It was, in fact, a mortgage, having been made to secure money borrowed by Johnson of Willingham and Easley. *No patent was ever issued to Johnson under his pre-emption and entry.* Subsequently, the land in question was sold by the United States to Kellom at the time and under the circumstances appearing in the statement of the case. It is claimed by Kellom and those whose interests are adverse to Willingham and Easley, that the latter have no lien, because the deed from Johnson, which is relied on to create such lien, is absolutely void.

This objection is based upon and involves a construction of section 12 of the aforementioned act of September 4, 1841, which provides that "all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void."

Does this intend to prohibit the pre-emptioner from all alienations of the property which he has acquired under the pre-emption act, prior to the issuing of the patent ? Or does it intend simply to prevent the transfer of the right to pre-empt ? That it means the former, was, by Mr. Justice MILLER, expressed to be his opinion in the case of *Beers v. Kellom*, decided

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in this court, and arising out of the transactions now in controversy.

This view seems to be the one best sustained by the terms of the statute, which, when plain, should be regarded and followed by the courts; and not frittered away by subtle and nice refinements.

Until payment made for the land and certificate of purchase procured, the pre-emptioner has nothing which he could assign or transfer. If, after certificate of purchase is obtained, there was intended to be no restriction on the disposition of the land by the pre-emption purchaser, why did the act use the words "prior to the issuing of the patent?"

If such restriction was intended, how natural the use of the words last quoted.

The other view is that the "right secured" is the right to pre-empt, that is, to purchase the land on certain terms and conditions preferably to others, and this right is fully secured when the purchase is made of the United States. The right thus preferably to purchase it is admitted cannot be transferred, and it is this alone (it is argued) which is prohibited. If so, why did the statute use the words, "prior to the issuing of the *patent*," instead of prior to the issuing of the *certificate*?

Again, this view best accords with the obvious purpose and policy of the pre-emption privilege.

The object of the government was in part to induce settlements upon the public lands, but chiefly to confer the preferable right to purchase upon those persons, usually in indigent circumstances, who actually settled or improved them. It was not to aid the speculator in lands. *Marks v. Dickson*, 20 *How.* 501, 505.

It is plain that pre-emptions merely for purposes of speculation will be less likely to be made if the pre-emptor is obliged, before alienating, to wait for the patent to issue.

Again: there was a similar provision in the prior

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act of May 29, 1830, 4 *Stat. at L.* 420, § 3. The language of the two acts, in this respect, is almost literally the same. By the act of January 23, 1832, 4 *Stat. at L.* 496, the prohibition as to assignments and transfers of the right of pre-emption, contained in the act of 1830, is removed, and it is provided that "All persons who have purchased lands under the act of May 29, 1830, may assign and transfer their certificates of purchase, or final receipts, and patents may issue in the name of such assignee, anything in the act aforesaid to the contrary notwithstanding. .

This shows that the language in question was understood by Congress as restricting alienations by the pre-emptor after payment and before patent issued.

The effect of allowing such transfers was seen to be such that Congress, in passing the carefully-framed act of September 4, 1841, renewed the prohibition against transfers, which was contained in the act of 1830. The government had witnessed the practical operation of the two opposite policies, and the judgment of Congress, as embodied in the later act, as to which is the better policy, should be respected by the courts, and the language of the statute should be allowed its natural and fair meaning.

Our attention has been called to no decision of the supreme court of the United States upon the point under consideration, and it is presumed it has never been determined by that tribunal. *Thredgill v. Pintard*, 12 *How.* 24, and *Marshall v. Bush*, 6 *Id.* 284, are referred to by counsel, but the question now before us is one which, it is evident, was not ruled by the court in either of those cases.

The question has, however, been frequently before the State courts, and they have with great uniformity held that the pre-emptor had no transferable right prior to the issuing of the patent. *Arbour v. Nettles*,

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12 *La. An.* 217 ; *Pourner v. White*, 2 *Id.* 974 ; *Penn v. Ott*, *Id.* 283 ; *Stanbaugh v. Wilson*, 13 *Id.* 494 ; *Stearns v. Hay*, 1 *Ind.* 247 ; *McElyea v. Hayter*, 2 *Port. (Ala.)* 148 ; *Cundiff v. Orms*, *Id.* 58 ; *Glen v. Thistle*, 28 *Miss.* 42, 49 ; *Wilkinson v. Mayfield*, 27 *Id.* 542 ; *McTyer v. McDowell*, 36 *Ala.* 39 ; *Paulding v. Grimsley*, 10 *Mo.* 210 ; *Contra*, *Randall v. Edert*, 7 *Minn.* 450.

If this is the true view of the statute, the deed from Johnson to Test was null and void, and neither by reason of the grant it purported to make, or the covenants it contained, can it operate as an estoppel ; and any subsequent interest acquired by Johnson would not inure to the benefit of the grantee named in the deed. *Doe v. Hays*, and *McElyea v. Hayter*, *ubi supra*, are express authorities on this point.

To hold otherwise would enable parties easily to evade the statute, and defeat its policy and purpose ; would contravene its plain language, and involve the legal absurdity of making an instrument declared by the law to be null and void, operate as effectually as if it was not under the ban of the statutory prohibition.

What would have been the rights of the grantee of the pre-emptioner had his entry never been canceled, and had he subsequently received a patent, we have no occasion now to inquire, and give no opinion upon that question.

But it is insisted that if the prohibition is applicable to the deed from Johnson to Test, it cannot avail the parties filing the bill of review, because they have not therein complained of this error in such a way as to apprise the defendants of their claim in this respect. *Story Eq. Pl.* § 420 ; *Id.* § 636 ; 3 *Daniel Ch. Pr.* 1729.

The bill of review states the former bill, answer, and replication, and the proceedings thereon, and the decree entered therein. By the pleadings in the original cause

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it distinctly appears that Johnson's entry was made under the pre-emption act, and that the complainants therein claimed under the deed from Johnson to Test, and that the respondents set up as a defense its invalidity because made in violation of the provisions of the act of Congress of September 4, 1841.

The court affirmed the validity of the deed, and held that it operated by estoppel upon the interest which Johnson subsequently acquired, and subjected that interest to sale.

The bill of review alleges that the decree of July, 1867, "is erroneous, and ought to be reviewed, reversed, and set aside, for that, it appears by the said decree, this court declared (1), that under the pleadings in this cause the said deed of conveyance from said Harrison Johnson to said James D. Test in the said bill and decree mentioned was a security for and operated as a mortgage of the premises therein mentioned ; (2), that said Johnson had such a title and interest in and to said lands in said bill and decree mentioned, as to give him a valid right to convey the same, and vest a valid right and interest in and to the said lands in his vendee ; (3), that the alleged agreement in the said bill and decree mentioned was in law valid and effectual, and subject to be enforced in law as between the parties."

When these allegations are examined in connection with the language of the pleadings and decree it is seen that they are reasonably specific as to the ground on which it is sought to impeach the decree.

This disposes of the case, and the result is that the prayer of the bill of review must be granted.

It may be added that a careful examination of the evidence has satisfied the court that the writing produced is a true copy of the original agreement, and being so, Johnson has no interest in the lands, except what he would be entitled to, if any, by reason of the

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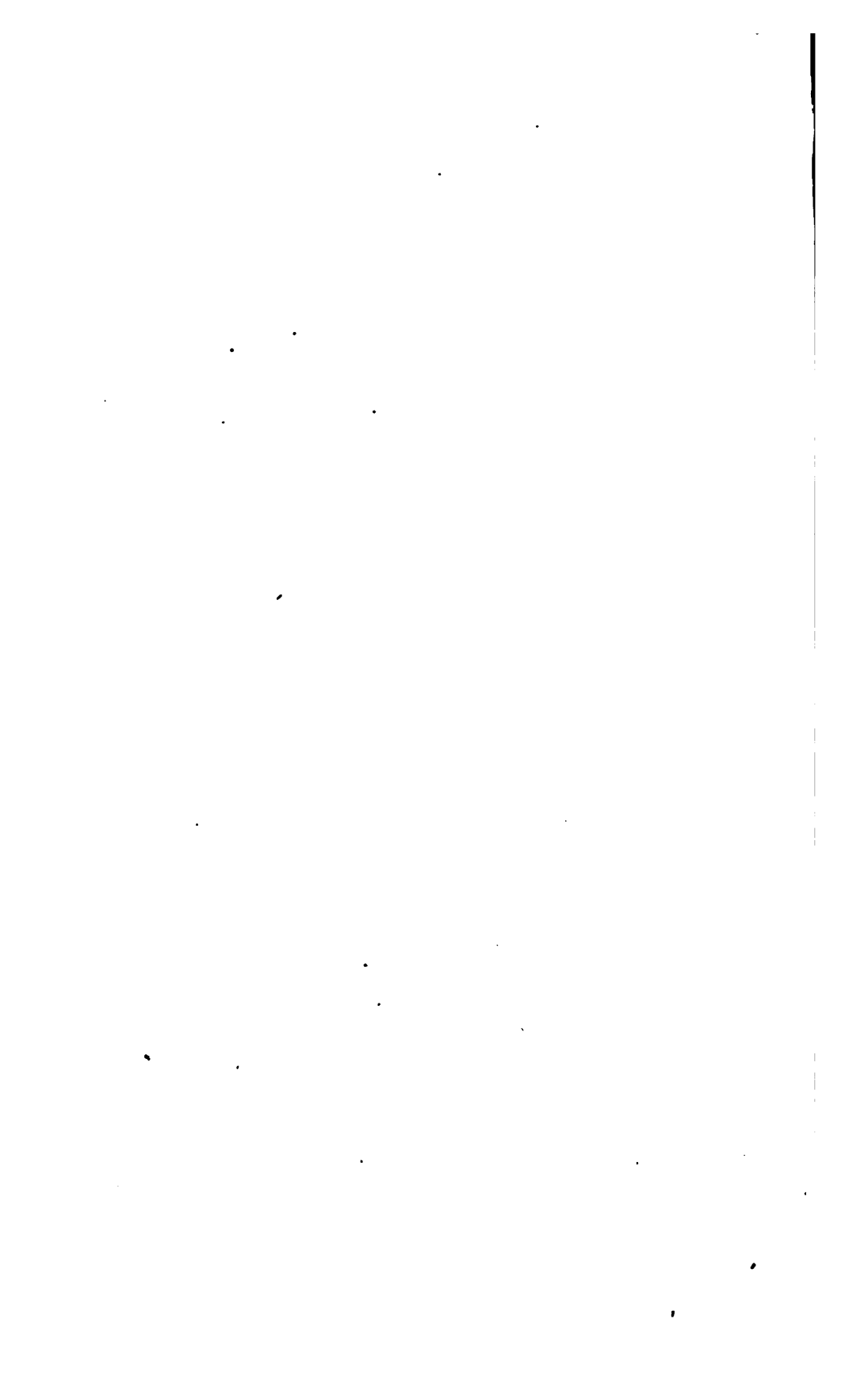
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rejection of the claim of Smith ; and it may also be added that we are inclined to the opinion that Smith's claim was improperly rejected.

Let a decree be drawn up in conformity with this opinion, reversing and setting aside the former decree.

DUNDY, J., concurred.

Decree accordingly.



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## ADMIRALTY.

1. A State statute,—such as chapter 6 of the Practice Act of California, declaring vessels subject to liens for materials or supplies furnished towards their construction, repair, or equipment, and directing that demands secured by such liens shall have preference in order of payment over other demands,—is valid and operative, even in its application to a domestic vessel supplied in her home port, so far as to entitle the holder of a demand within the statute to payment out of surplus proceeds remaining in the registry, after the satisfaction of maritime liens, in preference to a mortgagee of the vessel. *The Harrison*, 74.
2. The successive decisions of the supreme court abrogating the practice of enforcing such liens by proceedings *in rem*,—reviewed and explained. *Id.*

## ALIEN.

An alien cannot, under the laws of the United States governing the registry of vessels, be deemed master of a vessel, even for the purpose of defeating his claim to a lien for wages. *The Dubuque*, 20.

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## BANKING.

1. A national bank, organized and located in one State, may bring an action in the circuit court sitting within another State, against a citizen of the latter State. *Manufacturers' National Bank v. Baack*, 232.
2. For the purpose of sustaining such a power to sue, it may be presumed that the individual members of the national bank are citizens of the State wherein the bank is located, within the meaning of Art. III. § 2 of the Constitution, and section 4 of the Judiciary Act of 1789. *Ib.*
3. A circuit court has jurisdiction, upon a proper bill filed by a stockholder of a national bank, to enjoin the officers of the bank from misapplying its funds to the prejudice of the stockholder's interest therein, by acts which are not warranted by the charter, or amount to a breach of trust. *Shoemaker v. National Mechanics' Bank*, 416.
4. A loan made by a national bank in excess of the restriction imposed by section 29 of the National Banks Act of June 3, 1864, 18 *Stat. at L.* 99—which provides that the total liabilities to any banking association, of any borrower, shall not at any time exceed one-tenth of the capital stock,—is not void upon that account. The loan may be enforced; though (by section 53), the bank is exposed to forfeiture of its franchise, and the officers participating are declared personally liable. *Ib.*; *Stewart v. National Union Bank of Maryland*, 424.
5. A national bank has power to lend money upon the note or other personal obligation of the borrower secured by a pledge of stock of a corporation as collateral security. *Shoemaker v. National Mechanics' Bank*, 416.
6. Section 8 of the National Banks Act of June 3, 1864, 18 *Stat. at L.* 101,—which authorizes such banks to exercise under that act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, &c., by receiving deposits, by buying and selling exchange, &c., by loaning money on personal security, and by issuing, &c., circulating notes,—contains five distinct grants of power; and neither grant is a limitation upon any other. *Ib.*
7. An averment that the officers of a bank have loaned its funds to a specified person "upon the collateral security of railroad stock," does not show a violation of section 8; for the phrase "collateral security" imports a security additional to the personal obligation of the borrower; and, by the fourth of the

**BANKING—Continued.**

powers conferred by section 8, the bank may loan upon personal security not embraced in the first power. *Ib.*

**BANKRUPTCY.**

1. For the purpose of sustaining an action to set aside a transfer of property by a bankrupt as fraudulent against creditors, an assignee in bankruptcy is deemed to represent the *creditors*; and may impeach the transfer, notwithstanding it may be held valid and binding against the bankrupt himself. *Allen v. Massey*, 60.
2. A clause in an insurance policy declaring that the policy shall be void if assigned without the consent of the company, does not apply to a transfer made under the bankrupt law, by a register in bankruptcy, to an assignee appointed for the insured. *Starkweather v. Cleveland Ins. Co.*, 67.
3. An assignee in bankruptcy does not acquire the beneficial interest in the assets, but is merely clothed with the title and control as agent for the bankrupt and his creditors, and for the purpose of converting them into money and applying them to the discharge of the debts. The statutory transfer to such assignee is not within the purpose or operation of a condition in a contract restricting alienation of the beneficial interest. *Ib.*
4. The constitutional grant of power to Congress, to establish uniform laws on the subject of bankruptcy, is not limited to passing enactments similar in scope and operation to those in force in England when the Constitution was adopted. It gives Congress plenary power over the subject of bankruptcy; under one limitation only, that the laws passed upon that subject shall be uniform throughout the United States. *Silverman's Case*, 243.
5. The reasons why this power should be vested in the national government,—explained. *Ib.*
6. In the district court, sitting as a court of bankruptcy, pleadings must be special. Hence, a mere general denial of the intent with which an act relied upon as an act of bankruptcy is alleged to have been done, is not a good defense to the charge; but the respondent must also allege and prove with what intent he did such act. *Ib.*
7. When the unlawful intent is the necessary consequence of the act charged, as in the case of a payment of one creditor by an insolvent debtor, a mere denial of such intent is no answer to the petition, and judgment may be given against the respondent as upon a failure to answer. *Ib.*
8. Inasmuch as every man is presumed to intend the necessary consequences of his acts, a debtor who has paid one creditor to the exclusion of others, cannot be heard to say that he did not in-

**BANKRUPTCY—Continued.**

tend to give such creditor a preference. - The necessary effect of such payment is to give a preference. Judgment may be given against a respondent whose answer sets up no other matter of defense than the denial of the intent, as upon failure to answer. *Id.*

5. Where the act of a register in adjudging a petitioner a bankrupt is void at the time when made, for want of authority in the mover of the petition to present it, it cannot be sustained by a ratification, on the part of the petitioner, of the presentment. *Matter of Lady Bryan Mining Co.*, 527.

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**CARRIERS.**

1. The liability of a carrier of passengers, as such, for the baggage of a passenger, is limited to such property as is delivered to the care and custody of the carrier, or his agents and servants, during the transportation. It does not extend to articles which the passenger has in charge. *The R. E. Lee*, 49.
2. Thus, where jewelry usually worn by two lady passengers upon a steamboat, as a part of their apparel, was left by them in their state-room in a carpet-bag, with other articles of personal use, and was stolen while they were at supper,—*Held*, that the steamer was not liable therefor. *Id.*
3. In order to hold carriers liable for damages for injuries sustained by the occupant of premises adjoining their storehouse, through the explosion therein of a highly dangerous article,—*e. g.*, nitroglycerine,—held for transportation, the proof must show either that the defendants introduced the article with a knowledge of its dangerous character, or that they were negligent in the care and management of it. There is no absolute rule that the occupant of premises is an insurer against ill consequences to others from everything which he introduces upon them, irrespective of knowledge of its dangerous character. Nor is a carrier bound, as such, to know the character of the goods received by him for transportation. *Parrott v. Barney*, 197.

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## CIVIL RIGHTS.

1. Where the plaintiff in an action under the act of May 31, 1870, 16 *Stat. at L.* 140, for damages for preventing him from voting, alleges in the same count or cause of action that defendant prevented plaintiff from voting for several different officers, and that he refused his vote, refused to swear him as to his qualifications, &c., his pleading is bad for duplicity; upon special demurrer or motion to strike out. These different acts are distinct causes of action, under the statute, and should be alleged in separate counts or statements. *McKay v. Campbell*, 120.
2. In order to sustain an action, under the statute, for refusing to swear the plaintiff in order to enable him to prove his qualifications as an elector, as prescribed by the State law, the evidence upon the trial must show that the reason for the defendant's alleged refusal was on account of the race, color, or previous condition of servitude of the plaintiff. Hence, this fact must be alleged in the complaint. *Id.*
3. On indictment under section 19 of the act to enforce the right of citizens to vote, &c., approved May 31, 1870, 16 *Stat. at L.* 144, for "unlawfully preventing certain qualified voters from freely exercising the right of suffrage;" where the proof was, that the defendant, with others, attacked a number of voters, waiting in line for their turn to cast their ballots, and expelled them from the room; and that said voters afterwards returned and voted;—  
*Held*, 1. That the defendant committed the offense which Congress meant to define and punish in the clause of the section under which the indictment was drawn.  
 2. That the prevention took place, and the offense was complete, by the expulsion of the voters from the polls, although the prosecutors afterwards voted. *United States v. Souders*, 456.
4. The words "exercising the right of suffrage" in section 19 of the act of May 31, 1870, may be held to mean "voting," without bringing that section in conflict with the provisions of section 4 of the act,—provided that the penalties prescribed in section 19 be understood to apply to offenses committed at elections for members of Congress, and those in section 4 to State, county, and municipal elections. *Id.*

## COLLISION.

1. Neglect on the part of a pilot of a river steamboat to lay her course, when approaching another boat, in conformity to the well settled custom of boats plying upon that river; or the failure to keep a proper lookout,—*e. g.*, when the man on the lookout is stationed in the pilot-house behind the steamer's chim-

COLLISION—*Continued.*

neys, instead of on the hurricane deck,—is a fault in navigation which exposes the steamboat to liability for a collision occurring in consequence. *The Magenta*, 495.

2. Where both of the colliding vessels are in fault for the collision, the aggregate damages sustained by the two should be shared equally between them. *Id.*

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## COMMISSIONERS.

The powers and duties of commissioners, in criminal cases,—explained. *United States v. Schumann*, 524.

## CONFISCATION.

1. Even in determining the construction of a statute authorizing a confiscation of property for an offense by its owner, words are not to be confined to a strict technical sense, when so doing will clearly defeat the evident intent of the statute. *United States v. Athens Armory*, 129.
2. Thus, the employment of the phrase "prize and capture," in the act of August 6, 1861, 12 *Stat. at L.*, 819,—declaring private property used in promoting insurrection to be "lawful subject of prize and capture,"—does not limit the operation of the act to property taken at sea. Property found on shore, or even land itself, may be condemned under the act. *Id.*
3. An unqualified pardon, granted to the owner prior to the seizure of property, or the institution of any proceedings to condemn it, under the acts authorizing confiscation of property used to promote the rebellion of 1861-'65, is a bar to a judgment of condemnation. *Id.*

## CONSTITUTIONAL LAW.

1. Section 49 of the act of July 20, 1868, 15 *Stat. at L.* 144,—which gives supervisors of internal revenue the right to examine such books and papers as show the operation of banks, &c., with the public, and are connected with the internal revenue of the United States,—is not unconstitutional, either as purporting to authorize an unreasonable seizure and search, or as compelling a party to testify against himself. *Stanwood v. Green*, 184.
2. An act of Congress,—such as section 44 of the act of July 20, 1868, 15 *Stat. at L.* 142, which declares that real property employed in violation of a revenue law shall be forfeited therefor,—is not unconstitutional. Such an act must be sustained as a civil policy appropriate to accomplish a purpose vital to gov-

CONSTITUTIONAL LAW—*Continued.*

- ernment. *United States v. A Distillery in West-Front-street*, 192.
3. The constitutional grant of power to Congress, to establish uniform laws on the subject of bankruptcy, is not limited to passing enactments similar in scope and operation to those in force in England, when the Constitution was adopted. It gives Congress plenary power over the subject of bankruptcy; under one limitation only, that the laws passed upon that subject shall be uniform throughout the United States. *Silverman's Case*, 248.
4. The reasons why this power should be vested in the national government,—explained. *Ib.*
5. Under the Constitution, any and all uniform legislation, tending to promote the distribution of an insolvent debtor's assets among his creditors, and his discharge from their demands, is within the power of Congress. *Ib.*
6. The wisdom and soundness of the policy of allowing insolvent debtors to dictate preferences in the distribution of their assets,—questioned. *Ib.*
7. A State, acting through its legislature, may denude itself, by a contract, of power to impose taxes upon a corporation. But such exemption must be conferred expressly, or must appear by clear and necessary implication from the legislative act; it cannot be favored by presumption or intendment. *Minot v. Philadelphia, Wilmington, &c. R. R. Co.*, 328.
8. A tax upon the ordinary and lawful means of transportation is really a tax upon the thing carried; hence, a State law imposing a tax upon locomotives, passenger and freight cars, &c., being not merely a police regulation, but an expedient for raising revenue, involves a tax upon the passengers and freight transported, and is unconstitutional as interfering with commerce between the States. *Ib.*
9. Congress has power to authorize, by special act, the extension of a patent, notwithstanding the fact that the original patent has previously expired, and the invention has been introduced to public use. *Jordan v. Dobson*, 398.
10. *Query*, whether under the fifteenth amendment to the Constitution of the United States, Congress has power to pass any law to operate upon private individuals? *United States v. Souders*, 456.
11. Sections 12 and 13 of the pension act of July 14, 1864, 18 *Stat. at L.* 387,—which prescribe the fees of agents employed to collect pensions, and impose a penalty for receiving a greater fee than such as is prescribed,—are not unconstitutional. The power to secure to the pensioner the receipt of the pension

CONSTITUTIONAL LAW—*Continued.*

granted, free of unreasonable tolls or exactions, is incident to the undeniable power of Congress to grant pensions. *United States v. Marks*, 531.

## INTERNAL REVENUE, 2.

## CONTRACTS.

1. A loan made by a national bank in excess of the restriction imposed by section 29 of the National Banks Act of June 3, 1864, 13 *Stat. at L.* 99,—which provides that the total liabilities to any banking association, of any borrower, shall not at any time exceed one-tenth of the capital stock,—is not void, upon that account. The loan may be enforced; though (by section 53) the bank is exposed to forfeiture of its franchise, and the officers participating are declared personally liable. *Shoemaker v. National Mechanics' Bank*, 416; *Stewart v. National Union Bank of Maryland*, 424.
2. Although a loan made by a corporation appear to be in excess of a limit imposed by statute, and therefore not enforceable, yet, if it has been executed by the parties, a court of equity will not interpose, at the suit of the creditor of the borrower, to cancel the transaction and compel a return of the securities, but will leave the parties where it finds them. *Stewart v. National Union Bank of Maryland*, 424.

## MISTAKE.

## CORPORATIONS.

1. A circuit court has jurisdiction of a suit by a citizen of another State against a corporation created by the State in which the court is held; notwithstanding the corporation also holds charters from other States. *Minot v. Philadelphia, Wilmington, &c. R. R. Co.*, 323.
2. The payment, by a corporation, to the government of the State, of a *bonus* for granting a charter of incorporation, does not protect the grantee of the franchise from all taxation, except such as the State has reserved a right to impose in the charter itself. *Id.*
3. The trustees of a stock corporation have not power to direct the filing of a petition to have the corporation adjudged a bankrupt. *Matter of Lady Bryan Mining Co.*, 527.

## INSURANCE.

## COUNTERFEITING.

An indictment for "falsely making," &c., coin of the United States, under section 20 of the crimes act of 1825, 4 *Stat. at L.* 121,

COUNTERFEITING—*Continued.*

need not aver an intent to pass the coin as true, nor an intent to defraud. *United States v. Peters*, 494.

## COURTS:

## IN GENERAL.

1. The jurisdiction of any court, over either the person or the subject matter, may be inquired into whenever any right or benefit is claimed under its proceedings; and want of jurisdiction will render its judgment unavailable for any purpose. *Gray v. Larimore*, 542.
2. In applying this rule, the only difference recognized between courts of superior and of inferior jurisdiction is, that, with reference to courts of superior or general authority, jurisdiction is presumed until the contrary appears; but with reference to courts of inferior or limited authority, the jurisdiction must be affirmatively shown by parties who claim any right or benefit under their proceedings. *Id.*

## CIRCUIT COURTS.

3. *Query*, whether a circuit court within a State whose laws allow parties to examine each other upon a given cause of action or defense, ought to entertain a bill of discovery, merely in aid of such cause of action or defense? *Home Ins. Co. v. Stanchfield*, 1.
4. A circuit court has power, in a proper case, to issue a mandamus requiring State or municipal officers to proceed with the levy and collection of a tax. *United States ex rel. Lansing v. Treasurer of Muscatine County*, 58.
5. When such a mandamus has, in the lawful exercise of the jurisdiction of the court, been issued, but the officer to whom it is directed will not or cannot execute the duty commanded, the court may appoint its marshal to execute such duty and collect the tax. *Id.*
6. A national bank, organized and located in one State, may bring an action in the circuit court sitting within another State, against a citizen of the latter State. *Manufacturers' National Bank v. Baack*, 232.
7. For the purpose of sustaining such a power to sue, it may be presumed that the individual members of the national bank are citizens of the State wherein the bank is located, within the meaning of Art. III § 2 of the Constitution, and section 4 of the Judiciary Act of 1789. *Id.*
8. A circuit court has jurisdiction of a suit by a citizen of another State against a corporation created by the State in which the court is held; notwithstanding the corporation also holds char-

COURTS—*Continued.*

ters from other States. *Minot v. Philadelphia, Wilmington, &c. R. R. Co.*, 828.

9. A circuit court has jurisdiction, upon a proper bill filed by a stockholder of a national bank, to enjoin the officers of the bank from misapplying its funds to the prejudice of the stockholder's interest therein, by acts which are not warranted by the charter, or amount to a breach of trust. *Shoemaker v. National Mechanics' Bank*, 416.

## DISTRICT COURTS.

10. The admiralty jurisdiction of the district court in revenue cases, extends only to seizures for forfeitures under duty laws, as conferred by section 9 of the judiciary act of 1789, 1 *Stat. at L.* 76. The payment of duties can only be enforced by proceedings on the common law side of the court. *United States v. Five hundred boxes of Pipes*, 500.

JUDGE ; JURISDICTION.

## COVENANT.

LANDLORD AND TENANT.

## CREDITOR'S BILL.

By a creditor's bill it appeared that the judgment debtor had assigned certain assets, which complainant sought to reach, to a national bank, made a defendant, as collateral security for a loan, and had afterwards, but before the Bankrupt Act of 1867 took effect, made a general assignment to trustees for the benefit of creditors. The bill charged that the loan made by the bank was void for exceeding the corporate powers, and that the bank therefore acquired no title to the assets received as collateral. The general assignment was not assailed. *Held*, on demurrer, that the bill showed no right in the complainant to relief from the assets in question; for, if they did not vest in the bank by the assignment attacked by the bill, they must have vested in the trustees under the general assignment. *Stewart v. National Union Bank of Maryland*, 424.

## CRIMINAL LAW.

1. The district-attorney of the United States has no absolute power to dismiss a criminal charge while an examination of the accused is proceeding before a commissioner. *United States v. Schumann*, 528.
2. After indictment found, and before trial commenced, the district-attorney has absolute power to enter a *nolle prosequi*. But

**CRIMINAL LAW—Continued.**

while the charge is under examination, either before a commissioner or the grand jury, he attends only as counsel of the government, to present the evidence against the accused; and has no control over the course to be pursued. *Id.*

3. The powers and duties of commissioners, in criminal cases,—explained. *Id.*

**INDICTMENT.****DAMAGES.**

Where both of the colliding vessels are in fault for the collision, the aggregate damages sustained by the two should be shared equally between them. *The Magenta*, 495.

**DEFINITIONS.**

**COLLATERAL SECURITY.**—The phrase "collateral security" imports a security additional to the personal obligation of the borrower. *Shoemaker v. National Mechanics' Bank*, 416.

**FOREIGN PORT.**—A tug, engaged in towing vessels between Lake Erie and Lake Huron, is not a vessel bound to "a port in any other than an adjoining State," or to "any foreign port," within the meaning of section 5 of the act of 1790, 1 *Stat. at L.* 133,—prescribing the kind of contract to be entered into between master and mariner. *The John Martin*, 172.

**SOUND AND DISPOSING MIND AND MEMORY.**—The definition of "a sound and disposing mind and memory," given by WASHINGTON, J., in *Harrison v. Rowan*, 3 *Wash. C. Ct.* 585,—viz: that the testator must be capable of making his will, with an understanding of the nature of the business in which he is engaged, a recollection of the property of which he means to dispose, of the persons who are the objects of his bounty, and of the manner in which it is to be distributed between them; that it is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form; but it is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, the distribution of his property in its simple forms,—approved, and applied as a proper test for determining the capacity of a land owner to make a power of attorney authorizing the conveyance of his lands. *Hall v. Unger*, 507.

**VOYAGE.**—The term "voyage," as applied to vessels engaged in foreign and inter-State commerce within the meaning of the maritime law, is not applicable to a tug, making short trips from one body of water to another. *The John Martin*, 172.

## DEPOSITIONS.

EVIDENCE, 2.

## DESERTION.

EVIDENCE, 1; SEAMEN, 1-3, 8-10.

## DEVISE.

One who is entitled by the terms of a will, to a share of the proceeds of land sold, as legatee, cannot be barred of his rights in respect thereto, by an adjudication made in proceedings to which he is not a party. *Mathews v. Springer*, 283.

## DISCOVERY.

COURTS, 8.

## DISTRICT-ATTORNEY.

1. The district-attorney of the United States has no absolute power to dismiss a criminal charge while an examination of the accused is taking place before a commissioner. *United States v. Schumann*, 523.
2. After indictment found, and before trial commenced, the district-attorney has absolute power to enter a *nolle prosequi*. But while the charge is under examination, either before a commissioner or the grand jury, he attends only as counsel of the government, to present the evidence against the accused; and has no control over the course to be pursued. *Ib.*

## DISTRICT COURTS.

COURTS, 10.

## DUTIES.

1. The admiralty jurisdiction of the district court in revenue cases, extends only to seizures for forfeitures under duty laws; as conferred by section 9 of the judiciary act of 1789, 1 *Stat. at L.* 76. The payment of duties can only be enforced by proceedings on the common law side of the court. *United States v. Five hundred boxes of Pipes*, 500.
2. *It seems*, where imported goods have been seized for an alleged violation of the revenue laws, and a decision has been rendered in favor of the claimant, that the United States is not deprived of its lien upon the goods for the duties unpaid. *Ib.*

SMUGGLING.

## ELECTIONS.

CIVIL RIGHTS; EVIDENCE, 4.

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**EMANCIPATION.**

1. By the laws of Mississippi and Ohio, as they existed in 1858-'59, where an owner of slaves, residing in Mississippi, voluntarily carried them to Ohio with the intent that they should thereby become free, such slaves became free. And they could not lose that *status* by returning, with their former master, to Mississippi for temporary purposes. *Mathews v. Springer*, 288.
2. A devise of proceeds of real property, in favor of negroes formerly held as slaves, but who have been emancipated, is valid. *So held*, under the law of Mississippi, in reference to a case where the emancipation was by the act of the owner. *Ib.*

**EQUITY.**

1. A circuit court ought not to entertain a bill in equity filed by an insurance company, after a loss has occurred under a policy issued by them, to procure a decree canceling the policy and enjoining the insured from bringing any action upon it, where the bill is founded upon charges of fraud in obtaining the policy, which, if true, might be set up in defense of an action at law upon it. *So held*, where the policy contained a clause limiting the time for suing upon it to twelve months from the date of the loss; so that there was no danger of injury to the complainant through any unreasonable delay to sue. *Home Ins. Co. v. Stanchfield*, 1.
2. Although a loan made by a corporation appear to be in excess of a limit imposed by statute, and therefore not enforceable, yet, if it has been executed by the parties, a court of equity will not interpose, at the suit of a creditor of the borrower, to cancel the transaction and compel a return of the securities, but will leave the parties where it finds them. *Stewart v. National Union Bank of Maryland*, 424.
3. The general doctrine of courts of equity, relative to absent parties, is, that if persons out of the jurisdiction are merely passive objects of the judgment sought, or if their rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. But if such absent persons are to be active in the performance or execution of the decree; or if they have rights wholly distinct from those of the other parties; or if the decree ought to be pursued against them; then the court cannot properly proceed, without their being made parties. And the suit, so far at least as their rights and interests are concerned, should be stayed; for to this extent it is unavoidably defective. *Gray v. Larrimore*, 542.
4. All the partners, or their representatives, are indispensable

EQUITY—*Continued.*

parties to a bill filed to procure a dissolution of the copartnership and an account. *Ib.*

5. Where, upon a bill filed in a circuit court to procure a dissolution of copartnership and an account, one of the partners (or his representative) is not a resident of the State in which the suit is commenced, and cannot be served with process therein, the suit is defective, and cannot proceed, unless service by publication is authorized by the law of the State, and is made in strict conformity therewith; or unless there is a voluntary appearance. *Ib.*

CREDITORS' BILL; INJUNCTION; MISTAKE; PARTIES, 3; PLEADING, 7.

## EVIDENCE.

1. Where the statutory penalty for desertion is invoked, there must be statutory proof; otherwise it is not required. *The John Martin*, 172.
2. When, upon the hearing of a foreign extradition case, depositions of witnesses examined abroad, authenticated in the manner prescribed by the act of June 22, 1860, 12 *Stat. at L.* 84, are produced on the question of criminality, the judicial authorities here are bound to give them the same effect as would be given to the testimony of the witnesses if personally present and testifying. Thus, if the charge is forgery, and the depositions show that the witnesses had the alleged forged papers before them, no objection can be heard that such papers are not produced upon the examination. *Farez' Case*, 346.
3. When fraud is alleged, the burden of proving it is upon the party making the charge. *Jordan v. Dobson*, 398.
4. A copy of a return of an election in a township, filed with the clerk of the county, accompanied by the certificate of the clerk of the county, that it was a full and correct return of such election, as filed in his office,—sent to the office of the secretary of state, is not made and certified in the manner, and does not come from the source required by the election law of New Jersey, to constitute it an official paper. *United States v. Souders*, 456.
5. The law presumes that every adult man is sane, and possessed of the absolute right to sell and dispose of his property in whatever way he may choose; his will in every case standing as the reason of his conduct. The burden of proving insanity lies on the party who asserts it. *Hall v. Unger*, 508.
6. The fact of the existence of a prior or subsequent lunacy, except where it is habitual, does not suffice to change the burden of proof. But when such habitual insanity is shown to have

**EVIDENCE—Continued.**

existed, then the presumption is, that the party was insane at the time; and the burden of proof rests with those who allege the party's competency. *Ib.*

7. In considering whether an act impeached on the ground of insanity was valid, the attending circumstances may be considered; particularly the reasonableness of the act, and the approval of it at the time by the relatives of the party. *Ib.*
8. The presumption in favor of the judgments of superior courts is limited to jurisdiction over persons within their territorial limits, and to proceedings in accordance with the common law. If it appears, either from the record or by evidence outside, that the defendants were, at the time of the alleged service upon them, beyond the reach of the process of the court, or when the proceeding was not one in accordance with the common law, the presumption ceases, and the burden of establishing the jurisdiction over them is thrown upon the party who invokes the benefit of the judgments. *Gray v. Larrimore*, 542.

SEIZURES, 1.

**EXECUTION.**

PRACTICE, 6.

**EXTRADITION.**

1. The complaint in a foreign extradition case is not defective because it does not aver personal knowledge of the deponent, being a foreign consul, of the facts charged. An official statement of the charge, by a consul, made with distinctness enough to enable the accused to understand what is charged, is a sufficient complaint. *Farez' Case*, 846.
2. The complaint in a foreign extradition case need not show that any warrant has been issued against the accused, abroad. *Ib.*
3. The warrant issued by a commissioner in a foreign extradition case, need not show that the commissioner was appointed to issue the particular warrant. An averment of his authority to issue such warrants generally, is good. *Ib.*
4. Under the convention with Switzerland, 11 *Stat. at L.* 593, extradition is warranted, when one of the specified crimes has been committed, if it is subject to infamous punishment by the laws of the country where it was committed. It need not also be infamous by the laws of the United States. *Ib.*
5. There is no rule of procedure in foreign extradition cases, which entitles the accused to cross-examine the complainant, before any evidence has been offered on behalf of the prosecution. *Ib.*
6. When, upon the hearing of a foreign extradition case, deposi-

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EXTRADITION—*Continued.*

tions of witnesses examined abroad, authenticated in the manner prescribed by the act of June 22, 1860, 12 *Stat. at L.* 84, are produced on the question of criminality, the judicial authorities here are bound to give them the same effect as would be given to the testimony of the witnesses if personally present and testifying. Thus, if the charge is forgery, and the depositions show that the witnesses had the alleged forged papers before them, no objection can be heard that such papers are not produced upon the examination. *Id.*

7. In reviewing the proceedings in a foreign extradition case, upon *habeas corpus* and *certiorari*, the court cannot pass, in any manner, upon the discharge of the executive functions of the president. If the mandate of the president, authenticated by the State department, shows that the president considers that satisfactory evidence has been produced that the person named stands charged with the crime, the court can in no manner question the evidence on which the president came to that conclusion. *Id.*
8. The various rules which govern the authentication of the papers requisite or admissible in proceedings of foreign extradition,—stated and explained. *Id.*
9. In foreign extradition cases, the examination of the offender must be conducted according to the laws of the State in which the proceeding is had, as respects all particulars which are not specially regulated by a statute of the United States. *Id.*
10. If the laws of the State entitle a person under preliminary examination for a crime against those laws to testify in his own behalf,—*e. g.*, *N. Y. Laws of 1859*, ch. 678,—then a person under examination with a view to his extradition is entitled to be so examined. *Id.*
11. To justify holding a person accused of crime against a foreign government, for extradition, evidence furnishing good reason to believe that the crime alleged has been committed by the person charged, is necessary. But the examining magistrate should not require the full proof which would insure a conviction upon a trial in chief. *Id.*
12. Where, upon proceedings to revise the action of an examining commissioner, in committing a person charged with crime against a foreign government, for extradition, it appeared that the commissioner erred in refusing to permit the prisoner to be examined on his own behalf,—*Held*, that the prisoner must be discharged from custody under the final commitment; but that he was properly held under the warrant of arrest, and must be

**EXTRADITION—Continued.**

remanded to the custody of the marshal thereunder, and the examination should proceed anew. *Id.*

**FORFEITURE.**

The courts will not construe a law imposing a forfeiture, as extending to property which, before seizure, has been sold to a person innocent of the offense by which the forfeiture is incurred, and who has purchased in good faith, unless the intention of Congress that the forfeiture should be absolute and instantaneous on the commission of the offense, be manifest and unmistakable. *United States v. One hundred barrels of Spirits*, 805.

**FORMER ADJUDICATION.**

1. One who is entitled, by the terms of a will, to a share of the proceeds of land sold, as legatee, cannot be barred of his rights in respect thereto, by an adjudication made in proceedings to which he is not a party. *Mathews v. Springer*, 283.
2. The order of a court of competent jurisdiction, admitting an alien to citizenship, is in the nature of a judgment, and, in the absence of fraud, is conclusive as to the question of the requisite length of residence of the naturalized citizen in the United States. *The Acorn*, 434.

**FRAUD.**

When fraud is alleged, the burden of proving it is upon the party making the charge. *Jordan v. Dobson*, 398.

**FRAUDULENT CONVEYANCES.**

- I. Where household furniture in a dwelling inhabited by the owner and another person, was transferred by the owner to such other person, by bill of sale, and pointing out the property, but without any other circumstances to indicate an actual change of possession, and the parties continued to dwell together and to use the furniture, as before,—*Held*, the transfer was void against creditors, and under the statute of the State (Missouri) against fraudulent conveyances, as it had been construed by the supreme court of the State. *Allen v. Massey*, 30.
3. Inasmuch as every man is presumed to intend the necessary consequences of his acts, a debtor who has paid one creditor to the exclusion of others, cannot be heard to say that he did not intend to give such creditor a preference. The necessary effect of such payment is to give a preference. Judgment may be given against a respondent whose answer sets up no other matter of defense than the denial of the intent, as upon failure to answer. *Silverman's Case*, 243.

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**HABEAS CORPUS.**

1. Where the return to a writ of *habeas corpus* showed that the petitioner was held in custody under a commitment regular on its face, and made by a competent court, for an act charged as an offense against the State law, but the petitioner alleged that he was really held for an act done under authority of the United States, the court, in view of the case involving a question between the State and the national government, adjourned the hearing, and required the petitioner's counsel to give notice of the adjourned day to the State district-attorney for the county. *United States ex rel. Roberts v. Jailer of Fayette County*, 265.
2. Reasons recommending this practice,—explained. *Id.*
3. Upon a *habeas corpus* issued under section 7 of the act of March 2, 1883, 4 *Stat. at L.* 634, whether the petitioner is held under State or Federal process is immaterial. If he is confined "for an act done in pursuance of a law of the United States or of a process of any judge or court thereof," he is entitled to a discharge. *Id.*
4. The rule is now settled that the *habeas corpus* act of March 2, 1883, gives relief to one in State custody, not only when he is held under a law of the State which seeks expressly to punish him for executing a law or process of the United States, but also when he is in such custody under a general law of the State which applies to all persons equally, where it appears he is justified for the act done because it was done in pursuance of a law of the United States. *Id.*
4. The authority given to judges of the United States courts, by section 14 of the act of September 24, 1789, 1 *Stat. at L.* 81, to grant writs of *habeas corpus*, extends to cases where a prisoner is in custody under a valid conviction and sentence, but claims release upon the ground of a pardon. *Greathouse's Case*, 332.

**EXTRADITION, 7.****HOMICIDE.**

Where an officer, lawfully engaged in the attempt to execute process commanding an arrest, is resisted by the party to be arrested, in such manner that he is obliged to take the life of the latter in self defense, he is justified by his process in so doing. *United States ex rel. Roberts v. Jailer of Fayette County*, 265.

**INDICTMENT.**

1. An indictment for the offense of smuggling must allege the facts relied upon as rendering the importation alleged an offense, or state the particular illegality intended to be proved; and such allegation must be proved as laid. *United States v. Thomas*, 114.

INDICTMENT—*Continued.*

2. In an indictment under section 44 of the Bankrupt Act of 1867, it is not sufficient, either as to the proceedings or the jurisdiction of the court in bankruptcy, to rely merely upon a general averment. All matters necessary to constitute the offense as defined by the act must be pleaded. *United States v. Prescott*, 169.
3. The description of the goods, in an indictment under the act, should be as definite as in a declaration in trover. *Id.*
4. The word *feloniously* should be omitted in indictments under the act. The offenses made indictable are misdemeanors. *Id.*
5. In drawing indictments, figures should not be used for dates. *Id.*
6. Drawing indictments under the Bankrupt Act of 1867,—explained. *Id.*
7. An indictment for treason under section 2 of the act of July 17, 1862, 12 *Stat. at L.* 590, need not use the phrase "levying war," specifically; to follow the language of the act is sufficient. *United States v. Greathouse*, 864.
8. An indictment for "falsely making," &c., coin of the United States, under section 20 of the crimes act of 1825, 4 *Stat. at L.* 121, need not aver an intent to pass the coin as true, nor an intent to defraud. *United States v. Peters*, 494.

## INFORMATION.

In prosecuting an information to enforce a seizure, under the act of August 6, 1861, issues of fact should be submitted for trial by a jury, according to the course of the common law. The act does not contemplate the determination of the facts by the judge, as in causes of admiralty jurisdiction. *United States v. Athens Armory*, 129.

## INJUNCTION.

1. Section 19 of the Internal Revenue Act of July 13, 1866, 14 *Stat. at L.* 152, as amended March 2, 1867, *Id.* 475,—which provides that no suit to restrain the assessment or collection of any tax shall be maintained in any court,—applies to all cases where the officer has power to inquire and determine whether the thing assessed by him is liable to taxation, however erroneous his decision of that question may be. *Pullan v. Kinsinger*, 94.
2. The statute is not unconstitutional; either as depriving the party of his property without due process of law, or as refusing trial by jury. *Id.*
3. When a patent expires during the pendency of a suit for infringement, no perpetual injunction can be granted, but complainant may obtain a decree for an accounting. *Jordan v. Dobson*, 898.

INJUNCTION—*Continued.*

4. The general principles which govern courts of equity in granting preliminary injunctions, and in dissolving them upon the filing of the answer,—stated. *Shoemaker v. National Mechanics' Bank*, 416.

## INSANE PERSONS.

1. Mania,—which is mental derangement accompanied by excitement,—and dementia,—which is derangement accompanied by general enfeeblement of the faculties—do not invariably affect all the operations of the mind. The law recognizes the fact that either of these forms of derangement, may be limited (as monomania always is) to particular subjects, and may be consistent with capacity to act upon other subjects. *Hall v. Unger*, 507.
2. In determining the ability of an alleged insane person to execute any particular act, the inquiry should first be, what degree of mental capacity is essential to the proper execution of the act in question; and then, whether such capacity was possessed, at the time, by the party. *Id.*
3. The execution of a power of attorney to convey land requires no greater exercise of reason than does the making of a will of real property; and the question of capacity may be determined by the same rules, in either case. *Id.*
4. The definition of "a sound and disposing mind and memory," given by WASHINGTON, J., in *Harrison v. Rowan*, 3 Wash. C. Ct. 585,—viz: that the testator must be capable of making his will, with an understanding of the nature of the business in which he is engaged, a recollection of the property of which he means to dispose, of the persons who are the objects of his bounty, and of the manner in which it is to be distributed between them; that it is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form; but it is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, the distribution of his property in its simple forms,—approved, and applied as a proper test for determining the capacity of a land owner to make a power of attorney authorizing the conveyance of his lands. *Id.*
5. The law presumes that every adult man is sane, and possessed of the absolute right to sell and dispose of his property in whatever way he may choose; his will in every case standing as the reason of his conduct. The burden of proving insanity lies on the party who asserts it. *Id.*
6. The fact of the existence of a prior or subsequent lunacy, except where it is habitual, does not suffice to change the burden of

INSANE PERSONS—*Continued.*

- proof. But when such habitual insanity is shown to have existed, then the presumption is, that the party was insane at the time; and the burden of proof rests with those who allege the party's competency. *Id.*
7. In considering whether an act impeached on the ground of insanity was valid, the attending circumstances may be considered; particularly the reasonableness of the act, and the approval of it at the time by the relatives of the party. *Id.*
  8. *It seems* that, in general, a witness who subscribes an instrument, or an officer who takes the acknowledgement of one, is bound to satisfy himself, before he signs, that the party has the requisite mental capacity to execute the instrument; and that the presumption of capacity is therefore strengthened by the fact of attestation. *Id.*

## INSURANCE.

1. A circuit court ought not to entertain a bill in equity filed by an insurance company, after a loss has occurred under a policy issued by them, to procure a decree canceling the policy and enjoining the insured from bringing any action upon it, where the bill is founded upon charges of fraud in obtaining the policy, which, if true, might be set up in defense of an action at law upon it. *So held*, where the policy contained a clause limiting the time for suing upon it to twelve months from the date of the loss; so that there was no danger of injury to the complainant through an unreasonable delay to sue. *Home Ins. Co. v. Stanchfield*, 1.
2. A clause in an insurance policy declaring that the policy shall be void if assigned without the consent of the company, does not apply to a transfer made under the bankrupt law, by a register in bankruptcy, to an assignee appointed for the insured. *Starkweather v. Cleveland Ins. Co.*, 67.
3. By a supplement to its charter, a mutual insurance company was authorized to insure "for a specific rate of premium to be paid in cash, in the same manner as insurance companies" not mutual "are accustomed to do." The object of the supplement was to enable the company to issue two classes of policies, one on the mutual, and the other on the non-mutual plan, the premiums on the latter to be paid in cash. *Held*, that the company might accept a note for such premium, instead of cash; the taking being a mere extension of the time of payment, and none the less a payment in cash. *Carey v. Nagle*, 156.
4. The bankruptcy of the company is no defense to an action by the assignee of a note given for the premium on a policy of insurance. *Id.*

## INTERNAL REVENUE.

1. Section 19 of the Internal Revenue Act of July 13, 1866, 14 *Stat. at L.* 152, as amended March 2, 1867, *Id.* 475,—which provides that no suit to restrain the assessment or collection of any tax authorized, sha'll be maintained in any court,—applies to all cases where the officer has power to inquire and determine whether the thing assessed by him is liable to taxation, however erroneous his decision of that question may be. *Pullan v. Kinsinger*, 94.
2. The statute is not unconstitutional; either as depriving the party of his property without due process of law, or as refusing trial by jury. *Id.*
3. An act of Congress,—such as section 44 of the act of July 20, 1868, 15 *Stat. at L.* 142, which declares that real property employed in a violation of a revenue law shall be forfeited therefor,—is not unconstitutional. Such an act may be sustained as a regulation of civil policy appropriate to accomplish a purpose vital to government. *United States v. Distillery in West-Front-street*, 192.
4. A supervisor of internal revenue is entitled, under the provisions of the Internal Revenue Act of July 20, 1868, §49, 15 *Stat. at L.* 144, to examine the books and papers belonging to banks, bankers, brokers, and banking associations, and is not bound to inform the owners of his purpose in making such examination. *Stanwood v. Green*, 184.
5. Where a summons for the production of books has been issued by the supervisor of internal revenue, and such summons has been duly executed, but not complied with, a United States district judge may, upon application, and proof of these facts, issue a writ of attachment. *Id.*
6. Section 49 of the act of July 20, 1868, 15 *Stat. at L.* 144,—which gives supervisors of internal revenue the right to examine such books and papers as show the operation of banks, &c., with the public, and are connected with the internal revenue of the United States,—is not unconstitutional, either as purporting to authorize an unreasonable seizure and search, or as compelling a party to testify against himself. *Id.*
7. Under the Internal Revenue Act of July 13, 1866, 14 *Stat. at L.* 98, a removal by a distiller, of spirits distilled by him, from the place of distillation to a bonded warehouse, is a legal act; and it cannot be predicated of such a removal, where this is the only overt act charged, that it was done to defraud the United States of the tax thereon, so as to bring the case within those contemplated by section 14 of the act. *United States v. One hundred barrels of Spirits*, 805.

**INTERNAL REVENUE—Continued.**

8. Under the Internal Revenue Act of July 13, 1866, as amended March 2, 1867, 14 *Stat. at L.* 483, distilled spirits purchased in good faith by the claimant, while they were in a bonded warehouse of the United States, to whose collector he paid the taxes due thereon, cannot afterwards be seized in his hands and condemned as forfeited by reason of the previous failure of the distiller, in the course of the manufacture thereof, to keep the books and to make the tri-monthly reports required of him by law. *Ib.*
9. Section 5 of the act of March 31, 1868, 15 *Stat. at L.* 58, is not a repeal of that part of section 25 of the act of March 2, 1867, 14 *Id.* 483, which denounces penalties against distillers, for failing to make the entries and reports required of them by law. *Ib.*
10. The legislation of Congress respecting forfeitures against distillers,—reviewed; and the conclusion reached that it shows a uniform policy, from the beginning, not to extend forfeitures to property in the hands of innocent third persons. *Ib.*

**JUDGE.**

- A decree signed by a district judge after he has tendered a conditional resignation, but before it has been accepted by the government, is valid. *Northrop v. Gregory*, 503.

**JUDGMENT.**

1. The distinction between cases in which judgments may and those in which they may not be impeached collaterally, may be stated thus: They may be impeached by facts involving fraud or collusion, but which were not before the court or involved in the issue or matter upon which the judgment was rendered. They may not be impeached for any facts, whether involving fraud or collusion or not, or even perjury, which were necessarily before the court and passed upon. *The Acorn*, 434.
2. If, pending a writ of error or appeal, no stay of proceedings having been obtained, proceedings are taken to enforce the judgment, and property of the defendant is sold under them, the purchaser acquires a good title. *South Fork Canal Co. v. Gordon*, 479.
3. This rule is not a measure of protection afforded to strangers bidding at judicial sales only, but extends to the parties or their privies. It rests upon the principle that a judgment of a court having jurisdiction is, however erroneous, efficacious until reversed. *Ib.*
4. The rule governing the restoration, after reversal, is this: that the party unsuccessful in the court below is to be restored, by

**JUDGMENT—Continued.**

- reversal, to all things which he lost by the erroneous judgment or decree, if the title to them has not passed by the previous enforcement of the judgment or decree; and if it has, he is, in such case, to have a right of action for a money equivalent. *Id.*
5. The jurisdiction of any court over either the person or the subject matter, may be inquired into whenever any right or benefit is claimed under its proceedings; and want of jurisdiction will render its judgment unavailable for any purpose. *Gray v. Larimore*, 542.
  6. In applying this rule, the only difference recognized between courts of superior and of inferior jurisdiction is, that, with reference to courts of superior or general authority, jurisdiction is presumed until the contrary appears; but with reference to courts of inferior or limited authority, the jurisdiction must be affirmatively shown by parties who claim any right or benefit under their proceedings. *Id.*
  7. The presumption in favor of the judgments of superior courts, is limited to jurisdiction over persons within their territorial limits, and to proceedings in accordance with the common law. If it appears, either from the record, or by evidence outside, that the defendants were, at the time of the alleged service upon them, beyond the reach of the process of the court, or when the proceeding was not one in accordance with the common law, the presumption ceases, and the burden of establishing the jurisdiction over them is thrown upon the party who invokes the benefit of the judgments. *Id.*

**JUDICIAL SALE.**

1. If, pending a writ of error or appeal, no stay of proceedings having been obtained, proceedings are taken to enforce the judgment, and property of the defendant is sold under them, the purchaser acquires a good title. *South Fork Canal Co. v. Gordon*, 479.
2. This rule is not a measure of protection afforded to strangers bidding at judicial sales only, but extends to the parties or their privies. It rests upon the principle that a judgment of a court having jurisdiction is, however erroneous, efficacious until reversed. *Id.*

**JURISDICTION.**

1. When a question arises, in judicial proceedings, relative to the existence or validity of an organization claiming to be the lawful government of a foreign country, the courts of the United States are bound by the decision of the executive power. Such

**JURISDICTION—Continued.**

- a question is political, and not judicial, in its nature. *The Hor-net*, 85.
2. When a civil war is pending in a foreign country, between a portion of the people who adhere to a long established government, and another portion who assert a new government, the courts of the United States cannot recognize such new government, or admit it or its agents or representatives to a standing as parties in judicial proceedings, until the executive power has publicly recognized such new government. *Id.*
  3. Where the supreme court of a State has, by its decree and authorized officers, taken judicial control of the property and franchises of a corporation, and ordered their sale, they cannot be taken in execution by process from any other jurisdiction. *For v. Hempsfield R. R. Co.*, 151.

**COURTS.****JURY.****TRIAL.****LANDLORD.**

1. The general rule is that in the absence of a special agreement to the contrary, the tenant is liable to the landlord for all waste, by whomever committed; having his right of action over against the actual wrong-doer. *Parrott v. Barney*, 197.
2. This liability does not depend upon negligence, but is imposed for reasons of public policy. *Id.*
3. A covenant in a lease, that at the expiration of the term the tenant will quit and surrender the premises in as good condition as the reasonable use and wear thereof will permit, damages by the elements excepted, does not protect the tenant from liability for waste, although resulting from accident occurring without fault of the tenant. *Id.*
4. A covenant in a lease that the tenant will occupy the premises solely for a specified business, does not impose upon the landlord the risks of injury to the premises incident to the business, so as to defeat his right of action for waste incurred in the prosecution of such business, although not caused by any fault of the tenant. *Id.*
5. A tenant of a portion of a building may be held liable to the landlord for waste sustained therein. The liability is not confined to waste upon *lands* demised. *Id.*

**LIEN.**

**MECHANICS' LIEN**; SHIPPING, 1, 4-6.

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**LUNATICS.****INSANE PERSONS.****MANDAMUS.**

1. A circuit court has power, in a proper case, to issue a mandamus requiring State or municipal officers to proceed with the levy and collection of a tax. *United States ex rel. Lansing v. Treasurer of Muscatine County*, 58.
2. When such a mandamus has, in the lawful exercise of the jurisdiction of the court, been issued, but the officer to whom it is directed will not or cannot execute the duty commanded, the court may appoint its marshal to execute such duty and collect the tax. *Ib.*

**MARSHAL.**

A United States marshal has power to appoint a special bailiff to execute a particular process. *So held*, where the appointment in question was made within a State, the laws of which conferred that power upon sheriffs. *United States ex rel. Roberts v. Jailer of Fayette County*, 265.

**OFFICER.****MASTER.****SHIPPING, 1-8.****MASTER AND SERVANT.**

1. The liability of a person or corporation employing a contractor to construct a public work, for personal injuries sustained by a third person, through unskillful or improper means of performance, is not limited to cases where an incompetent or unsuitable person has been employed as contractor. *Ware v. St. Paul Water Co.*, 261.
2. If a work of a kind in the ordinary doing of which a nuisance occurs, being lawfully undertaken, has been negligently or improperly prosecuted; or if it was ordered without lawful authority, however prosecuted; a third person who has sustained injuries thereby, without fault on his own part, may recover from the employer, notwithstanding the performance was intrusted to a contractor instead of to hired laborers. *Ib.*

**MECHANICS' LIEN.**

In an action in the circuit court, brought to foreclose a lien upon a canal for labor and materials furnished in constructing it, the court, having jurisdiction of the parties and the subject matter, passed upon the amount of the indebtedness of the South Fork

**MECHANICS' LIEN.**—*Continued.*

Canal Company to the complainant; upon the existence of the lien asserted, and its extent, and adjudged that the lien extended to the entire flume and canal; and it decreed the sale of the property in case payment of the complainant's demand was not made by a day designated. The payment was not made, and the sale took place, the master following, in all particulars, the direction of the decree. His report of his proceedings was not excepted to, and was confirmed. The complainant was mentioned in the decree as a possible bidder, and provision made for crediting his bid on the amount adjudged due to him. The master reported that H., the assignee of the complainant, became the purchaser, and when the report was confirmed, the master was directed to execute to him a deed of the property. *Held*, that the purchaser acquired a title to the premises which could not be divested by a reversal, in the supreme court, of the judgment; although such reversal proceeded upon the ground that the lien established by the complainant extended to a portion of the canal only, and that the judgment was erroneous in directing the whole to be sold. *South Fork Canal Co. v. Gordon*, 479.

**MISTAKE.**

1. Where an agreement between two parties was reduced to writing, and read over and signed by the complainant, it is not sufficient in a suit in equity for the reformation of such agreement, for the complainant to allege that he supposed the terms of the written agreement were, in legal effect, the same as the true terms of the agreement previously entered into by the parties. Such a mistake is one of law, and not of fact; and will not warrant the interference of a court of equity. *Hoover v. Reilly*, 471.
2. What evidence is sufficient to warrant the granting of relief by a court of equity in a suit to reform a written agreement, on the ground of mistake,—explained. *Id.*
3. A motion to open a decree in admiralty entered by default, must be made within ten days after entry; otherwise it must be denied. *Northrop v. Gregory*, 508.
4. A motion to open a decree in admiralty entered by default, must be accompanied by the answer proposed to be filed, or at least by a statement of the grounds of defense intended; so that the court can determine whether the defense is meritorious. *Id.*
5. A decree signed by a district judge after he has tendered a conditional resignation, but before it has been accepted by the government, is valid. *Id.*

**MORTGAGE.**

An indorser upon a note not yet matured, gave a mortgage upon a vessel to secure his contingent liability. Afterwards, the liability became fixed. The mortgage, however, entitled him to an extension of time for payment. *Held*, that the mortgagee was to be deemed a mortgagee for a valuable consideration, and entitled, as such, to intervene for the protection of his interest, in a libel filed against the vessel to recover wages. Either the extension of time for payment of the debt, or the waiver by the holder of the note of the right to sue the indorser, and in such suit to attach the vessel, constituted a sufficient consideration for this purpose. *The Dubuque*, 20.

**MOTIONS.**

PRACTICE.

**NATIONAL BANKS.**

BANKING.

**NATURALIZATION.**

The order of a court of competent jurisdiction, admitting an alien to citizenship, is in the nature of a judgment, and in the absence of fraud, is conclusive as to the question of the requisite length of residence of the naturalized citizen in the United States. *The Acorn*, 484.

**NEGLIGENCE.**

1. The liability of a person or corporation employing a contractor to construct a public work, for personal injuries sustained by a third person, through unskillful or improper means of performance, is not limited to cases where an incompetent or unsuitable person has been employed as contractor. *Ware v. St. Paul Water Co.*, 261.
2. If a work of a kind in the ordinary doing of which a nuisance occurs, being lawfully undertaken, has been negligently or improperly prosecuted; or if it was ordered without lawful authority, however prosecuted; a third person who has sustained injuries thereby, without fault on his own part, may recover from the employer, notwithstanding the performance was intrusted to a contractor instead of to hired laborers. *Id.*

**OATH.**

SHIPPING, 12.

## OFFICER.

The duty and proper mode of proceeding, by a marshal or sheriff, or deputy of either, in making an arrest under a warrant,—explained. *United States ex rel. Roberts v. Jailer of Fayette County*, 285.

## PARDON.

1. An unqualified pardon, granted to the owner prior to the seizure of property, or the institution of any proceedings to condemn it, under the acts authorizing confiscation of property used to promote the rebellion of 1861-'65, is a bar to a judgment of condemnation. *United States v. Athens Armory*, 129.
2. In the case of a general pardon by proclamation or act of the legislature, of which the court takes judicial notice, the court must dismiss all knowledge of the intentions of the pardoning power, except such as is to be derived from the terms of the act of grace itself. *Greathouse's Case*, 382.
3. Where a pardon is granted, with a condition annexed, the fact that the person pardoned is in prison, and must accept the condition before receiving the benefit of the pardon, does not constitute such duress as will make his acceptance of the condition of no effect. *Id.*

## PARTIES.

1. It is a fatal defect in a bill to enjoin the infringement of a patent for an invention, that all the owners of the patent have not been made parties. *Jordan v. Dobson*, 398.
2. But those persons only are deemed owners, within the rule, to whom the patent was issued, or to whom interests in it have been transferred by assignment in writing, duly authenticated. *Id.*
3. The general doctrine of courts of equity, relative to absent parties, is, that if persons out of the jurisdiction are merely passive objects of the judgment sought, or if their rights are merely incidental to those of the parties before the court, then, inasmuch as a complete decree may be obtained without them, they may be dispensed with. But if such absent persons are to be active in the performance or execution of the decree; or if they have rights wholly distinct from those of the other parties; or if the decree ought to be pursued against them; then the court cannot properly proceed, without their being made parties. And the suit, so far at least as their rights and interests are concerned, should be stayed; for, to this extent, it is unavoidably defective. *Gray v. Larrimore*, 542.
4. All the partners, or their representatives, are indispensable parties

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**PARTIES—Continued.**

to a bill filed to procure a dissolution of the copartnership and an account. *Id.*

5. Where, upon a bill filed in a circuit court to procure a dissolution of copartnership and an account, one of the partners (or his representative) is not a resident of the State in which the suit is commenced, and cannot be served with process therein, the suit is defective, and cannot proceed, unless service by publication is authorized by the law of the State, and is made in strict conformity therewith; or unless there is a voluntary appearance. *Id.*

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**PATENTS.**

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2. But those persons only are deemed owners, within the rule, to whom the patent was issued, or to whom interests in it have been transferred by assignment in writing duly authenticated. *Id.*
3. In a suit founded upon a re-issued patent, the courts must presume that the commissioner duly performed his duty of ascertaining that the defect in the original specification was owing to inadvertence, accident, or mistake; and that the amended description is of the same invention as was covered by the original patent. *Id.*
4. *It seems*, that this presumption is conclusive, except against the allegation of fraud in the transaction. *Id.*
5. Congress has power to authorize, by special act, the extension of a patent, notwithstanding the fact that the original patent has previously expired, and the invention has been introduced to public use. *Id.*

PATENTS—*Continued.*

6. A special act of Congress, authorizing an extension of a particular patent, should be read and construed in connection with the general acts on the subject of patents. *Id.*
7. The decision of the commissioner of patents in granting an extension, is conclusive evidence of all the facts which he is required to find before issuing it,—*e. g.*, of the fact that there has not been an abandonment of the invention. *Id.*
8. The issue, re-issue, and extension of a patent, and the fact that it has been sustained in previous suits, create a strong presumption against a defense of want of novelty in the invention. *Id.*
9. The validity of the extended patent, granted August 20, 1862, under special act of May 30, 1862, for improvements in manufacture of fibrous materials,—examined and sustained. *Id.*
10. A license granted by the patentee of an invention, permitting the invention to be manufactured and used upon certain terms and conditions, cannot be deemed evidence of an acquiescence in infringements of his right. It implies the assertion of an exclusive right in the invention. *Id.*
11. When a patent expires during the pendency of a suit for infringement, no perpetual injunction can be granted, but complainant may obtain a decree for an accounting. *Id.*

PENSIONS.

1. Sections 12 and 13 of the pension act of July 4, 1864, 13 *Stat. at L.* 887,—which prescribe the fees of agents employed to collect pensions, and impose a penalty for receiving a greater fee than such as is prescribed,—are not unconstitutional. The power to secure to the pensioner the receipt of the pension granted, free of unreasonable tolls or exactions, is incident to the undeniable power of Congress to grant pensions. *United States v. Marks*, 581.
2. By the express terms of the pension act of July 4, 1864, 13 *Stat. at L.* 887, the penalty imposed by section 13 upon a pension agent, for receiving greater fees than are prescribed by section 12 for services in collecting pensions, is incurred only where the fees are received for conducting a claim preferred *under that act*. It cannot be enforced against one who has received an excessive fee for services in collecting a pension given under another act of Congress,—*e. g.*, the act of July 14, 1862, 12 *Stat. at L.* 566. *Id.*
3. The pension acts of 1862 and 1864, considered in connection; and the effect of the latter upon the former, construed and explained. *Id.*

**PARTIES—Continued.**

to a bill filed to procure a dissolution of the copartnership and an account. *Ib.*

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2. By the express terms of the pension act of July 4, 1864, 13 *Stat. at L.* 387, the penalty imposed by section 13 upon a pension agent, for receiving greater fees than are prescribed by section 12 for services in collecting pensions, is incurred only where the fees are received for conducting a claim preferred *under that act*. It cannot be enforced against one who has received an excessive fee for services in collecting a pension given under another act of Congress,—*e. g.*, the act of July 14, 1862, 12 *Stat. at L.* 586. *Id.*
3. The pension acts of 1862 and 1864, considered in connection; and the effect of the latter upon the former, construed and explained. *Id.*

## PLEADING.

1. Where the plaintiff, in an action under the act of May 31, 1870, 16 *Stat. at L.* 140, for damages for preventing him from voting, alleges in the same count or cause of action that defendant prevented plaintiff from voting for several different officers, and that he refused his vote, refused to swear him as to his qualifications, &c., his pleading is bad for duplicity; upon special demurrer or motion to strike out. These different acts are distinct causes of action, under the statute, and should be alleged in separate counts or statements. *McKay v. Campbell*, 120.
2. But as the objection could only be taken, at common law, by special demurrer, it must be taken, under a reformed code which substitutes a motion to strike out for the special demurrer,—such as the *Oreg. Code of Pro.* § 103,—by such motion, and not by demurrer. *Ib.*
3. In the district court, sitting as a court of bankruptcy, pleadings must be special. Hence, a mere general denial of the intent with which an act relied upon as an act of bankruptcy is alleged to have been done, is not a good defense to the charge; but the respondent must also allege and prove with what intent he did such act. *Silverman's Case*, 243.
4. When the unlawful intent is the necessary consequence of the act charged, as in the case of a payment of one creditor by an insolvent debtor, a mere denial of such intent is no answer to the petition, and judgment may be given against the respondent as upon a failure to answer. *Ib.*
5. A libel for collision must state the facts constituting the fault in navigation on the ground of which damages are claimed against the vessel libeled. A mere general allegation that “she was so carelessly, negligently, unskillfully, and recklessly navigated that,” &c., is not sufficient. *The H. P. Baldwin*, 257.
6. The requisites of an answer seeking to set up want of novelty in the invention, in defense to a bill for an infringement of a patent, and the sufficiency of the evidence to sustain such defense,—considered. *Jordan v. Dobson*, 398.
7. Where an agreement between two parties was reduced to writing, and read over and signed by the complainant, it is not sufficient, in a suit in equity for the reformation of such agreement, for the complainant to allege that he supposed the terms of the written agreement were, in legal effect, the same as the true terms of the agreement previously entered into by the parties. Such a mistake is one of law, and not of fact; and will not warrant the interference of a court of equity. *Hoover v. Reilly*, 471.

PLEADING—*Continued.*

8. A bill of review should state the former proceedings, and where-  
in the party exhibiting it considers himself aggrieved. The  
sufficiency of allegations in this respect,—considered and de-  
cided. *Kellom v. Easley*, 559.

PRACTICE.

ATTACHMENT.

1. Where a summons for the production of the books has been is-  
sued by the supervisor of internal revenue, and such summons  
has been duly executed, but not complied with, a United States  
district judge may, upon application, and proof of these facts,  
issue a writ of attachment. *Stanwood v. Green*, 184.

ERROR AND APPEAL.

2. The mandate of the supreme court, upon a writ of error or ap-  
peal, must be promptly and implicitly enforced by the court be-  
low, except so far as the enforcement may be modified or re-  
strained by events occurring subsequent to the period covered  
by the record in the supreme court. *South Fork Canal Co. v.*  
*Gordon*, 479.
3. Such events may often modify the manner of enforcing the man-  
date. *Ib.*
4. If, pending a writ of error or appeal, no stay of proceedings hav-  
ing been obtained, proceedings are taken to enforce the judg-  
ment, and property of the defendant is sold under them, the  
purchaser acquires a good title. *Ib.*
5. The rule governing the restoration, after reversal, is this: that  
the party unsuccessful in the court below is to be restored, by  
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enforcement of the judgment or decree; and if it has, he is,  
in such case, to have a right of action for a money equivalent.  
*Ib.*

EXECUTION.

6. The act of 1870 does not repeal any of the preliminaries before  
levy and sale, required by section 75 of the act of 1836, in pro-  
ceeding against a corporation, but is "in addition" thereto.  
The preliminaries required by the former act are still essential to  
the validity of a levy. *Fox v. Hempfield R. R. Co.*, 151.

JUDICIAL SALE.

PROCESS.

7. A United States marshal has power to appoint a special bailiff to  
execute a particular process. *So held*, where the appointment in  
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**PRACTICE—Continued.**

that power upon sheriffs. *United States ex rel. Roberts v. Jailer of Fayette County*, 265.

8. As a statute authorizing a suit to be commenced against a non-resident by means of service by publication is in derogation of the common law, its provisions must be strictly pursued, in order to sustain a judgment in the subsequent course of the suit so commenced. A failure to comply with any of the requirements of the statute will be fatal to the judgment, unless cured by voluntary appearance. *Gray v. Larrimore*, 542.
9. The requisites prescribed by the laws of California, to obtain an order for the service of the summons in a civil action, by publication, and the proofs required to show such service,—stated and considered, in a cause involving the rights of a purchaser under the judgment as against the defendant, suing, after reversal of the judgment, to recover back the property sold under it. *Id.*

**REMOVAL OF CAUSES.**

10. The operation of the acts of Congress authorizing actions commenced in State courts for acts done under authority of the president, or of any act of Congress, during the rebellion of 1861-'65, to be removed to a circuit court,—explained. *Woodson v. Fleet*, 15.
11. A person sued in a State court for making an arrest in obedience to those claiming to be the municipal officers of the peace, and engaged in suppressing a riot, is not entitled to a removal of the cause to a circuit court,—under the act of March 3, 1863, 12 *Stat. at L.* 757, as amended by act of May 11, 1866, 14 *Id.* 46,—merely because, prior to the arrest, the military officers of the United States had issued an order recognizing the persons under whom defendant acted, as lawfully vested with the local government, and declaring that they would be sustained, in the exercise of such authority, by the United States; but not directing the arrest made, or commanding any particular acts. *Id.*

**PROCESS.**

**PRACTICE**, 7-9.

**PUBLIC LANDS.**

Under section 12 of the act of September 4, 1841, 5 *Stat. at L.* 453, relating to pre-emptions of the public lands,—which provides that "all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void," a pre-emptioner, though he has a certificate of purchase, cannot, prior

PUBLIC LANDS—*Continued.*

to the issue of the patent, convey the land. *Kellom v. Easley*, 559.

2. Conveyances made by a pre-emptioner before patent issued, are void, and, if he fails ever to obtain a patent, can operate neither by way of grant or estoppel. *Ib.*

## REMOVAL OF CAUSES.

PRACTICE, 10, 11.

## SALVAGE.

The true rule for awarding salvage in cases of derelict is this: Divide the proceeds which remain over all costs and disbursements of the salvage suit equally between the salvors and the owners of the rescued property, giving to each of these two interests a moiety. *The Cayenne*, 42.

## SEAMEN.

1. A seaman, by the consent and with the assistance of the mate, but unknown to and without the permission of the master, who was on board, left the vessel. *Held*, that the seaman was not guilty of desertion, nor liable to the forfeiture of the arrears of his wages. *The Caroline E. Kelly*, 160.
2. A seaman leaving a vessel under such circumstances is discharged; and if such discharge occurs in a foreign port, he is entitled to three months' extra wages, under section 2 of the act of February 28, 1803, in addition to the arrears of his stipulated wages. *Ib.*
3. When the absence of a seaman from his vessel is set up to affect him prejudicially, the permission of the temporary commanding officer must be taken as giving a sanction which prevents the penalty for desertion from attaching. *Ib.*
4. A seaman claiming a certain sum for wages due him, was refused payment of a portion of it, unless he would sign a receipt in full against the schooner and her owners, and look to the captain for the balance. *Held*, that his receipt, signed under such circumstances, was good only for the sum actually paid. *The Galloway C. Morris*, 164.
5. Where there has been no change of ownership in a vessel, forbearance by a seaman to enforce his lien on it for wages due, until after twenty-one months' continuous service, does not render his claim stale. *Ib.*
6. A tug-boat was engaged in towing vessels between Lake Erie and Lake Huron. During a trip, when the tug was off Detroit, the engineer, who was verbally hired by the month, and whose time was not up, demanded to be landed at that place,

SEAMEN—*Continued.*

saying he had a better offer. The master refused, whereupon the engineer left his post of duty and did not return to it. Upon the return of the tug he was put ashore at Detroit. *Held*, that this was a case of desertion, and that the engineer by his conduct had forfeited all wages due to him. *The John Martin*, 172.

7. A tug, engaged in towing vessels between Lake Erie and Lake Huron, is not a vessel bound to "a port in any other than an adjoining State," or to "any foreign port," within the meaning of section 5 of the act of 1790, 1 *Stat. at L.* 133,—prescribing the kind of contract to be entered into between master and mariner. *Id.*
8. Section 5 of the act of 1790, 1 *Stat. at L.* 133, and section 25 of the act of 1856, 11 *Id.* 82,—relating to the desertion of mariners,—must be construed together as statutes *in pari materia*. They do not repeal the maritime law of desertion. *Id.*
9. An offer by an engineer, who has disobeyed orders and deserted, made five or six weeks after such desertion, to return, is not made within a reasonable time. *Id.*
10. Where the statutory penalty for desertion is invoked, there must be statutory proof; otherwise it is not required. *Id.*

## SEIZURES.

1. Where, in a libel for forfeiture for alleged violation of the registry laws, the claimant is charged with not being the owner of the vessel, and all the evidence relating to the ownership is introduced by the government, which tends to prove rather than disprove such ownership on the part of the claimant, such evidence must be taken as a whole; and the claimant need not introduce evidence upon the subject, to establish his ownership. *The Acorn*, 484.
2. In a libel for such cause, where the claimant is charged with not being a citizen of the United States at the time of the enrollment, and, in order to refute such charge, he introduces in evidence an exemplified copy of the record of his naturalization under the United States laws in a court of competent jurisdiction, he need not also prove the preliminary proceedings necessary to give the naturalizing court jurisdiction. *Id.*

## FORFEITURE; INFORMATION.

## SHIPPING.

1. A master has no lien upon the vessel for his wages. *The Debuque*, 20.
2. Under the laws of the United States governing the registry of

SHIPPING—*Continued.*

- vessels, the person in whose name, as master, a vessel is registered, must be deemed her master for every legal intendment and purpose. *Ib.*
3. Where there is a master *de jure* by virtue of the registry, there cannot be, in contemplation of law, another master *de facto*. Another person employed by the owners to navigate and even to discipline the ship, does not become master in either sense. The relation of master is fixed by the registry. *Ib.*
  4. In respect to the question what delay to enforce a maritime lien will warrant its being postponed to subsequent liens acquired without notice, the same rule applies to claims for wages, as to claims for repairs and supplies. *Ib.*
  5. The general rule is, that a delay to enforce a maritime lien after a reasonable opportunity to do so, is deemed a waiver of the lien as against subsequent purchasers or incumbrancers in good faith and without notice, unless such delay is satisfactorily explained. *Ib.*
  6. What is a stale claim,—considered. *The Galloway C. Morris*, 164.
  7. The act of April 26, 1866 (14 *Stat. at L.* 40),—directing the secretary of the treasury to issue enrollment and license to certain vessels therein named,—is mandatory in its terms; and an oath, in accordance with the provisions of section 4 of the act of December 31, 1792 (1 *Stat. at L.* 287), to obtain enrollment and license under the former act, is unnecessary. *The Acorn*, 434.
  8. An oath thus made to procure enrollment is extra-judicial, and of no effect; and though the oath was false, the provisions of law declaring a forfeiture in such cases have no application. *Ib.*
  9. The custom of steamboats navigating the Mississippi river, in respect to directing their course when meeting each other,—explained. *The Magenta*, 495.
- ALIEN; ADMIRALTY; DEFINITIONS; SALVAGE; SEAMEN.

## SMUGGLING.

Merely importing goods subject to duty without having paid or secured the duties, is not, in general, an offense. To constitute smuggling, for which an indictment may be sustained, there must be something in the manner of the importation which violates a statute defining the offense; such as secrecy or concealment, an intent to defraud the revenue, or the like. *United States v. Thomas*, 114.

INDICTMENT, 1.

## STATES.

## HABEAS CORPUS; TAXES.

## STATUTES.

1. Revenue laws inflicting penalties for their violation, are not to be construed strictly, nor with excess of liberality; but in such a manner, looking at their policy, purpose, spirit, and language, as will best effectuate the legislative intention. *United States v. One hundred barrels of Spirits*, 305.
2. Repeals by implication are not favored, particularly in revenue laws, and will only be held to exist when the repugnance is positive, and then only to the extent of such repugnance. *Id.*
3. Where several statutes upon the same general subject are inconsistent or doubtful in meaning, they should be examined together, and the probable intent of the legislature, as ascertained from the acts in their connexion, and from the attending circumstances, should be carried into effect. *Le Roy v. Chabolla*, 448.
4. The act of the legislature of California of March 17, 1866,—declaring lands of the city of San Jose “not hitherto disposed of by ordinance,” &c., to be vested in the corporate authorities of the city in trust for the use and benefit of the public schools,—was not intended, and therefore did not operate as a confirmation of the previous sheriff’s sale of lands in that city attempted to be made under the ordinance of November 10, 1851. *Id.*

ADMIRALTY; CONFISCATION, 1, 2; CONSTITUTIONAL LAW; FORFEITURE; PATENTS, 6, 9; PRACTICE, 8, 10; SEAMEN, 2, 7, 8; TREASON, 6.

## STATUTES CONSTRUED.

Act of September 24, 1789, 1 *Stat. at L.* 73. *Manufacturers’ National Bank v. Baack*, 232; *Greathouse’s Case*, 332; *United States v. Five hundred boxes of Pipes*, 500.

Act of July 20, 1790, 1 *Stat. at L.* 131. *The John Martin*, 172.

Act of December 31, 1792, 1 *Stat. at L.* 287. *The Acorn*, 434.

Act of February 23, 1803, 2 *Stat. at L.* 203. *The Caroline E. Kelly*, 160.

Act of March 3, 1825, 4 *Stat. at L.* 115. *United States v. Peters*, 494.

Act of March 2, 1833, 4 *Stat. at L.* 632. *United States ex rel. Roberts v. Jailer of Fayette County*, 265.

Act of September 4, 1841, 5 *Stat. at L.* 453. *Kellom v. Easley*, 559.

Act of August 13, 1856, 11 *Stat. at L.* 52. *The John Martin*, 172.

Act of June 22, 1860, 12 *Stat. at L.* 84. *Farez’s Case*, 346.

STATUTES CONSTRUED—*Continued.*

- Act of August 6, 1861, 12 *Stat. at L.* 819. *United States v. Athens Armory*, 129.
- Act of March 3, 1863, 12 *Stat. at L.* 755. *Woodson v. Fleet*, 15.
- Act of June 3, 1864, 13 *Stat. at L.* 99. *Shoemaker v. National Mechanics' Bank*, 416; *Stewart v. National Union Bank of Maryland*, 424.
- Act of July 4, 1864, 13 *Stat. at L.* 387. *United States v. Marks*, 531.
- Act of April 25, 1866, 14 *Stat. at L.* 40. *The Acorn*, 434.
- Act of May 11, 1866, 14 *Stat. at L.* 46. *Woodson v. Fleet*, 15.
- Act of July 18, 1866, 14 *Stat. at L.* 98. *Pullan v. Kinsinger*, 94; *United States v. One hundred barrels of Spirits*, 305.
- Act of March 2, 1867, ch. 169, 14 *Stat. at L.* 471. *United States v. One hundred barrels of Spirits*, 305.
- Act of March 2, 1867, ch. 176, 14 *Stat. at L.* 517. *United States v. Prescott*, 169.
- Act of July 20, 1868, 15 *Stat. at L.* 125. *Stanwood v. Green*, 184; *United States v. Distillery in West-Front-street*, 192.
- Act of May 31, 1870, 16 *Stat. at L.* 140. *McKay v. Campbell*, 120; *United States v. Souders*, 456.

TAXES.

1. A State, acting through its legislature, may denude itself, by a contract, of power to impose taxes upon a corporation. But such exemption must be conferred expressly, or must appear by clear and necessary implication from the legislative act; it cannot be favored by presumption or intendment. *Minot v. Philadelphia, Wilmington, &c. R. R. Co.*, 323.
2. The payment, by a corporation, to the government of the State, of a *bonus* for granting a charter of incorporation, does not protect the grantee of the franchise from all taxation, except such as the State has reserved a right to impose in the charter itself. *Id.*

MANDAMUS, 1, 2.

TREASON.

1. The history of the constitutional definition of treason, and the meaning of its terms,—explained. *United States v. Great-house*, 364.
2. Rebels, being citizens, are not enemies within the meaning of the Constitution; hence, a conviction for treason, in promoting a rebellion, cannot be sustained under that branch of the constitutional definition which speaks of "adhering to their enemies, giving them aid and comfort." *Id.*

TREASON—*Continued.*

3. But aid rendered to a rebellion may sustain a conviction under that clause of the definition which relates to levying war. *Ib.*
4. To constitute a levying of war, there must be an assemblage of people with force and arms, to overthrow the government or resist the laws. *Ib.*
5. Where war has been levied, all who aid in its prosecution by performing any part in furtherance of the common object, however minute, or however remote from the scene of action, are guilty of treason. *Ib.*
6. The true construction of the act of July 17, 1862, for the punishment of treason, is, that Congress intended, 1. To preserve the act of 1790 (which prescribes the death penalty) in force for the prosecution and punishment of offenses committed previous to July 17, 1862, unless the parties accused are convicted under the act of the latter date, for subsequent offenses; and, 2. To punish treason thereafter committed with either death or fine and imprisonment, in the discretion of the court, unless the treason consist in engaging in or assisting a rebellion or insurrection; in which event, the death penalty is to be abandoned, and a less penalty is to be inflicted. *Ib.*
7. The purchase of a vessel, guns, and ammunition; the preparing her for sea, and making her ready for service in aid of the rebellion of citizens of the United States against the government thereof, and after war has been levied, with the purpose of attacking and destroying American vessels, are overt acts of treason. *Ib.*
8. That such acts, done in furtherance of the common design of the insurgents, give "aid and comfort to the rebellion," is a conclusion of law which follows the acts, whether the vessel actually sails, or whether its cruise be successful or not. It is not essential to constitute giving aid and comfort, that the effort should be successful, and actually render assistance. Overt acts, which, if successful, would advance the interests of the rebellion, amount to aid and comfort. *Ib.*
9. A letter of marque, issued by a self-styled government, erected by some of the States, or the people thereof, in rebellion against the authority of the United States, constitutes no defense to a judicial trial for treason in acts of levying war, done under such letter, so long as the legislative and executive departments have not recognized the existence of such self-styled government, and its authority to issue letters of marque. *Ib.*

INDICTMENT, 7.

## TRIAL.

1. In prosecuting an information to enforce a seizure, under the act

**TRIAL**—*Continued.*

- of August 6, 1861, issues of fact should be submitted for trial by a jury, according to the course of the common law. The act does not contemplate the determination of the facts by the judge, as in cases of admiralty jurisdiction. *United States v. Athens Armory*, 129.
2. Although in criminal trials in United States courts, the jury have power to disregard the instructions of the court, and in case of acquittal their decision will be final; yet it is their duty to take the law from the court, and apply it to the facts of the case. *United States v. Greathouse*, 364.

**WAR.**

1. When a civil war is pending in a foreign country, between a portion of the people who adhere to a long established government, and another portion who assert a new government, the courts of the United States cannot recognize such new government, or admit it or its agents or representatives to a standing as parties in judicial proceedings, until the executive power has publicly recognized such new government. *The Hornet*, 35.
2. The amnesty proclamation of the president, of December 8, 1863,—offering pardon to those persons who had participated in the then existing rebellion, upon the condition of their subscribing to an oath to support the United States Constitution, &c.,—extends to persons who, prior to the date of the proclamation, had been convicted and sentenced for the offenses described in such proclamation. *Greathouse's Case*, 382.
3. That proclamation included within its benefits, not only those who joined the rebellion in arms, but also those who were in any way implicated therein. *Ib.*

TREASON, 4.

**WITNESS.**

If the laws of the State entitle a person under preliminary examination for a crime against those laws, to testify in his own behalf,—*e. g.*, *N. Y. Laws of 1869*, ch. 678,—then a person under examination with a view to his extradition, is entitled to be so examined. *Farez' Case*, 346.

INSANE PERSONS, 8.

THE END.









